IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 39

JAMES MONROE, et al.,

Petitioners,

vs.

FRANK PAPE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for Petitioners

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Petitioners

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals (R. 31-34) is reported at 272 F. 2d 365 (1959). The judgment of the Court of Appeals is at R. 34.

The opinion of the District Court (R. 20-31) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1959. (R. 34). The petition for a writ of certiorari was granted on March 28 1960. —— U.S. ——. (R. 35). The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners, a husband, wife and their six children, stated a cause of action for damages under the Civil Rights Act, R.S. § 1979, when they alleged that thirteen Chicago police officers, acting under color of law: arbitrarily and unreasonably broke into their home and searched it in the nighttime without a warrant; assaulted and battered them without cause; humiliated them with invidious references to their race; forced two of them from their bed naked; arbitrarily arrested and secretly confined one of them for interrogation and exhibition in line-ups and, finally, released him without ever charging him with a crime.

2. Whether a municipal corporation can be sued under R.S. § 1979 for damages arising from fourteenth amendment due process violations by its police officers.

STATUTES INVOLVED

R.S. § 1979 (42 U.S.C.A. § 1983):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 (28 U.S.C.A. § 1343):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. (1958 ed.) § 1331 (28 U.S.C.A. § 1331):

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Amendment 14, Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT

Petitioners brought this action for damages, alleging violation of their fourteenth amendment rights, under the Civil Rights Act, R.S. § 1979, in the United States District Court for the Northern District of Illinois against thirteen Chicago police officers and the City of Chicago.[1] On June 5, 1959, the District Court dismissed the complaint for failure to state a claim. Leave to amend the complaint was denied. (R. 18). On November 23, 1959, the Court of Appeals affirmed, for the same reason. (R. 33, 34).

The complaint asserted:

In the early morning of October 29, 1958, Mr. and Mrs. James Monroe and their six children were at home in their Chicago apartment, asleep in their beds. At 5:45 A.M., Deputy Chief of Detectives Pape and twelve other policemen broke and entered through the front and rear doors of the Monroe dwelling. (R. 3).

Chief Pape and two others entered the bedroom of Mr. and Mrs. Monroe. They shined flashlights into the faces of the sleeping couple, pointed their pistols and ordered James Monroe out of his bed. Chief Pape cursed Mr. Monroe and threatened to shoot him if he didn't move fast. Mr. Monroe was naked. He left the bedroom at gunpoint. He was forced to stand in the center of his living room naked. (R. 3).

Another officer ordered Mrs. Monroe out of bed. She refused, explaining that she was naked. The officer dragged her out and pushed her into the living room. Chief Pape was questioning Mr. Monroe. He kept calling him "nigger"

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[1] Federal jurisdiction was invoked "under 28 U.S.C.A. §§ 1331 and 1343 and 42 U.S.C.A. § 1983, . . . and Amendment XIV to the Constitution of the United States." (R. 1).

and "black boy," and hit him in the belly with his flashlight several times. Meanwhile, the six children were being herded into the living room. One detective kicked four-year-old James Monroe, Jr., who fell to the floor and began to cry. Later, Chief Pape struck Robert Stevens, knocked him down and pushed a third child, Houston, to the floor on top of Robert. (R. 3-4).

Mrs. Monroe's daughter Jacqueline started for the back door. She wanted to reach a telephone, call a family friend and get help. An officer stepped between Jacqueline and the door, pushed her down and prevented her from leaving. (R. 4-5).

The police searched every room. They ransacked the closets, throwing all the family's clothing on the floor. They opened and dumped all the drawers in the various pieces of furniture. They ripped open all the mattresses. (R. 3-4, 5).

Mr. Monroe was then allowed to dress. His hands were chained together and he was escorted outside. (R. 5).

The police had no warrant for the search or the arrest. (R. 6). The search and seizure was arbitrary and unreasonable. (R. 9).

Mr. Monroe was taken to police headquarters and imprisoned for about ten hours. Periodically, Mr. Monroe was removed from his cell and placed on exhibition in "line-ups." Between line-ups he was interrogated about a murder. (R. 6-7).

Throughout his imprisonment Mr. Monroe was held on "open" charges. No bail was set. He was refused permission to call an attorney or his family. No one informed Mr. Monroe of his rights. (R. 7). The police had no intention of bringing him promptly to court to answer to a charge of crime. They had not arrested him for this pur-

pose. He was being held in an attempt to coerce incriminating statements from him, to exhibit him before other officers and civilians, to punish him, and to "check up" on his background. (R. 7-9). He was never brought before a judge. (R. 7).

Twenty local courts with jurisdiction to receive criminal complaints and to admit to bail were in session during Mr. Monroe's detention, four of them in the same building where he was held. (R. 8).

After ten hours, Mr. Monroe was released without charge. No charge ever was placed against him. (R. 7-8).

All of the officers involved "were duly appointed, qualified and acting police officers . . . of the . . . City of Chicago . . . and were agents of the . . . City, acting in the course of their employment and engaged in the performance of their duties as police officers. . . ." (R. 1). All of them were assigned to the Police Department's "Detective Bureau," and they were personally led by the respondent Frank Pape, Deputy Chief of Detectives—the second ranking officer in the Bureau. (R. 2).

At all times mentioned, these officers were "acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois . . . and the City of Chicago." (R. 2).

The Pleadings: Count I of the complaint (R. 1-10) alleges the facts and prays judgment for petitioner, Mr. James Monroe. Count IV (R. 12) incorporates the facts by reference and prays judgment for petitioner Mrs. Flossie Monroe. Count VII (R. 14-15) incorporates the facts by reference and prays judgment for each of the six Monroe children, who are also petitioners here. These counts invoke R.S. § 1979. The remaining counts of the complaint invoke R.S. §§ 1980 and 1981, which, for the reasons stated in the brief (p. 20), are not relied upon by petitioners in this Court.

SUMMARY OF ARGUMENT.

Petitioners' complaint states a cause of action against the individual police officers under R.S. § 1979, because it properly alleges that the officers, acting under color of law, committed an unreasonable search of petitioners' home in the nighttime, in violation of the due process clause of the fourteenth amendment. This Court, in *Wolf* v. *Colorado*, 338 U.S. 25 (1949) and *Elkins* v. *United States*, 364 U.S. (Adv.), 80 S. Ct. 1437 (1960), has held that such searches violate the due process clause.

Respondents' suggestion that no federal remedy is available in a damage action under R.S. § 1979, if an adequate state judicial remedy exists, is ill-founded. Title 28 U.S.C. § 1343 (3) explicitly confers "original jurisdiction" upon federal district courts in actions brought under R.S. §1979.

The "specific intent" rule which is a requirement of proof, if not of pleading, in criminal prosecutions under the Civil Rights Act (*Screws* v. *United States*, 325 U.S. 91, 103 (1945)), is not applicable to the case at bar which involves civil liability. The "specific intent" doctrine of *Screws* was imposed to meet fifth amendment vagueness objections to the criminal statute (18 U.S.C. § 242) there involved. These objections are not applicable to statutes creating mere civil liabilities. Congress has recognized this fact by inserting in § 242 the word "willfully." It did not so act in the case of R.S. § 1979. Thus the statutory predicate for the "specific intent" rule in *Screws* is lacking here. No unfairness can result from not requiring petitioners to show "specific intent," because police brutality and unreasonable searches and seizures have been outlawed in Anglo-American law for centuries. The respondents could not have been misled.

The City of Chicago is liable under the complaint because the rule of *respondeat superior* is implicit in the provisions of R.S. § 1979, and the fourteenth amendment, which R.S. § 1979 was passed to enforce. In the alternative, the congressional debates on R.S. § 1979, contemporary construction of its provisions, and past holdings of this Court indicate that the city is a "person" within the meaning of the statutory prohibition upon "every person." This fact is reinforced by the Act of Congress passed February 25, 1871—just seven weeks before enactment of R.S. § 1979—which provides that the word "person" may be construed to include bodies "politic and corporate."

No exception to the rule of liability contained in the statute should be, by judicial interpretation, read into its provisions. This is so because the rule of municipal immunity which respondents seek to engraft upon the statute was not universally accepted in the law at the time R.S. § 1979 was adopted. In addition, the rule of municipal immunity is unjust and harmful to the community. By no stretch of imagination can municipal immunity be termed "one of the presuppositions of our political history." *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951).

State municipal immunity law cannot control construction of the Federal Civil Rights Act because the purpose of both the Act and the fourteenth amendment is to secure uniform protection for civil liberties throughout the country. If the Act's application is made dependent upon local law in questions of liability, its provisions will mean different things in different states. The Act will also mean different things at different times in the same state. Illinois is a good example. There, the rule of immunity has been abolished as to cities, effective Dec. 16, 1959.

The dearth of civil damage actions for police misconduct in every state in the nation makes it clear that no unreasonable burdens will be imposed upon cities if the Court refuses to read an exemption into the Act on their behalf.

ARGUMENT.

"Freedom under law is like the air we breathe. People take it for granted and are unaware of it—until they are deprived of it. The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law. The dread knock on the door in the middle of the night. . . ."

Dwight D. Eisenhower, "U.S. Law Day" Address, May 1, 1958. *Time Magazine*, May 5, 1958, p. 11.[1]

I.

THE LIABILITY OF THE INDIVIDUAL POLICE OFFICERS.

A. THE COMPLAINT STATES A CAUSE OF ACTION UNDER R.S. § 1979.

Jurisdiction of the District Court below was invoked (R. 1) under 28 U.S.C. § 1343, 28 U.S.C.A. § 1343:

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

". . . .

"(3) To redress the deprivation, under color of any State Law. . . of any right . . . secured by the Constitution of the United States. . . ."

[1] The nations of the world agree that the inviolability of the home, free from arbitrary official intrusion, is a fundamental right of man. See the collection of the constitutional search and seizure provisions of 60 nations in Appendix C, pp. 84-106, of this Brief.

Petitioners' civil action was authorized by the following law:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any other person . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law. . . ."
>
> R.S. § 1979, 42 U.S.C.A. § 1983.[2]

Petitioners claim that respondents violated rights secured by the due process clause of the Fourteenth Amendment. (R. 9).

1. The Fourteenth Amendment Due Process Rights of Petitioners Were Violated by the Unreasonable Search and Seizure Alleged in the Complaint.

The complaint alleges a nighttime search of petitioners' home by city police officers conducting a criminal investigation. (R. 3-5). It alleges that respondents had no warrant (R. 6), and that the search was "arbitrary and unreasonable." (R. 9).

These acts constituted "state action" for fourteenth amendment purposes, and were committed under color of law. (R. 1-2); *Williams* v. *United States*, 341 U.S. 97, 99-100 (1951); *Screws* v. *United States*, 325 U.S. 91, 107-108, 109-10 (1945).

Under *Wolf* v. *Colorado*, 338 U.S. 25 (1949), the acts of respondents violated petitioners' fourteenth amendment rights:

> "[N]othing could be of greater relevance to the present inquiry than the underlying constitutional

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[2] This section was invoked by Count I (R. 9), Count IV (R. 12) (incorporation by reference), and Count VII (R. 14) (incorporation by reference).

Federal jurisdiction was also invoked under 28 U. S. C. § 1331 and the Fourteenth Amendment.

doctrine which *Wolf* established. For there it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."

Elkins v. *United States,* 364 U.S. (Adv.), 80 S. Ct. 1437, 1442 (1960).

Thus, petitioners have alleged every element of the cause of action conferred by R. S. § 1979, and the dismissal of their complaint was error.[3] *Cf., Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Smith* v. *Allwright,* 321 U.S. 649 (1944).

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[3] This conclusion is in accord with that of the Fifth Circuit in Davis v. Turner, 197 F. 2d 847 (1952), which is squarely in point.

This conclusion is supported also by the suggestion in Irvine v. California, 347 U.S. 128, 137-38 (1954) by Justice Jackson and Chief Justice Warren, that the officers who in that case invaded the privacy of a gambler's home be prosecuted under the criminal provisions of the Civil Rights Act:

This conclusion is also *in accord* with the following cases which, although not squarely in point, may be deemed relevant:

Jackson v. Duke, 259 F. 2d 3 (5th Cir. 1958).
Coleman v. Johnston, 247 F. 2d 273 (7th Cir. 1957).
Geach v. Moynahan, 207 F. 2d 714 (7th Cir. 1953).
McShane v. Moldovan, 172 F. 2d 1016 (6th Cir. 1949).
Davis v. Johnson, 138 F. Supp. 572 (N.D. Ill. 1955).
State of Arkansas v. Central Surety Corp., 102 F. Supp. 444 (W.D. Ark. 1952).
Erickson v. Hogan, 94 F. Supp. 459 (S.D.N.Y. 1950) (Dictum).
Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947).

This conclusion is *opposed* by the following cases which appear to be in point:

Jennings v. Nester, 217 F. 2d 153 (7th Cir. 1954).
[Criticized, Comment, 103 U. Pa. L. Rev. 1088 (1955).]
Mackey v. Chandler, 152 F. Supp. 579 (W.D.S.C. 1957).
[Criticized, Comment, 10 Stan. L. Rev. 347 (1958).]

Although there are other lower court cases which are seemingly opposed in principle to petitioners' present contention, the above two opinions are the only reported adverse decisions explicitly dealing with unreasonable searches and seizures by police officers.

All reported decisions known to petitioners involving civil suits against police officers under the Civil Rights Act were briefed in Appendix G to the Petition for Certiorari in this case.

• • •

The plain language of the statutes, of *Wolf*,[4] and of *Elkins*, makes it clear that a cause of action has been stated under R. S. § 1979. However, because the courts below have denied this conclusion, petitioners have attached as Appendix A to this brief (pp. 67-76) a memorandum demonstrating that the individual's right to privacy in his home, free from unreasonable searches, is indeed "implicit in the concept of ordered liberty," and that the Congress which enacted R. S. § 1979 knew it.

Nothing in *Stefanelli* v. *Minard*, 342 U.S. 117 (1951), is inconsistent with the view urged here. *Stefanelli* involved an attempt under R. S. § 1979 to secure an injunction from a federal district court against the use in a state criminal trial of evidence which had been illegally seized by local police. This Court invoked the doctrine of equitable discretion and declined to interfere with the state proceedings, saying:

> "... [U]nder the very section now invoked, we have withheld relief in equity *even when recognizing that comparable facts would create a cause of action for damages.*"
>
> 342 U.S. at 122 (Emphasis supplied).[5]

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[4] The repulsiveness of the "additional aggravating conduct" [Irvine v. California, 347 U.S. 128, 145 (1954) (dissenting opinion)] which accompanied the unreasonable search in the instant case, brings the violation of petitioners' home to the "core" of the proscription of the fourth amendment. See Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[5] The Court in Stefanelli expressly left open the question whether the complaint in that case stated a cause of action under R. S. § 1979. 342 U.S. at 120.

It should be noted that the majority opinion in Stefanelli was foreshadowed by Erickson v. Hogan, 94 F. Supp. 459 (S.D.N.Y. 1950), and the Court was familiar with the opinion in that case. See 342 U.S. at 124 n. 12. In Erickson, District Judge Ryan had broadly hinted that a federal cause of action for damages under R. S. § 1979 was available to the victim of an unreasonable search by local police. 94 F. Supp. at 460 (final paragraph).

The decisive consideration which led the Court in *Stefanelli* to deny relief is absent in the case at bar; this action is not an attempt to "interfere with [a] State criminal prosecution." 342 U.S. at 121. The courts below were not asked by petitioners to "intervene piecemeal to try collateral issues" in a pending Illinois litigation. See 342 U.S. at 123. Thus, not only is the *Stefanelli* doctrine of "[d]iscretionary refusal to exercise equitable power" (342 U.S. at 121) inappropriate in the present action at law, but the policy which counseled the exercise of that discretion in *Stefanelli* is inapplicable here.

2. The Availability of State Judicial Remedies for the Wrongs Alleged in the Complaint Does Not Bar Petitioners' Federal Remedy Conferred by the Civil Rights Act.

Respondents (Brief in Opposition to Cert., pp. 4, 9), and the Court below (R. 33), seem to urge that the availability of a state tort remedy somehow bars petitioners from obtaining redress under the Civil Rights Act.[6]

This construction negates both the language and policy of the Act; in effect, it operates as a judicial repealer.

Section 1979 confers a remedy for violation of federal constitutional rights. It contains no exceptions. Title 28, § 1343 (3) provides that federal district courts are to have

[6] The Seventh Circuit's position on this point is more clearly stated in the cases cited in the opinion below. Thus, in United States ex rel. Atterbury v. Ragen, 237 F. 2d 953 (7th Cir. 1956) it was held that a complaint failed to state a claim under R. S. § 1979 because:

> "The common law provides adequate action for damages against errant law enforcement officials."
>
> 237 F. 2d at 955 (Cited at R. 33).

This same statement was made in Jennings v. Nester, 217 F. 2d 153, 155 (7th Cir. 1954), also cited at R. 33. It was quoted again on March 4, 1960, in Egan v. Aurora, 275 F. 2d 377, (7th Cir.).

"original jurisdiction" of such cases. It contains no exceptions.[7]

In passing these laws, Congress, performing its constitutional function of enforcing the fourteenth amendment by "appropriate legislation" (Amend. XIV, § 5), saw fit to give litigants a federal remedy in federal courts for the violation of federal rights. Respondents and other who disagree with this congressional policy are free to seek amendment or repeal of the Act. But courts should not emasculate the Act because they doubt its wisdom. Cf. *Flemming* v. *Nestor*, 363 U.S. (Adv.) 603, 611 (1960); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 419 (1950) (Frankfurter, J., concurring).

> "Full force and effect is therefore given to Section Five [of the Fourteenth Amendment], which declares that 'Congress shall have power to enforce by appropriate legislation the provisions of this article.' . . . . It is for Congress in its discretion to determine what legislation is appropriate, and its decision is binding upon every other department of the government."
>
> Rep. Stoughton, Michigan, *Globe* 322 (March 29, 1871). [All *"Globe"* references are to *Cong. Globe*, 42d Cong., 1st Sess.]

Significantly, there are those who believe that the policy of federal protection of federal rights is wise indeed. See, e.g., *To Secure These Rights—The Report of the President's Committee on Civil Rights, passim* (1947). Thus,

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[7] As originally passed, the Civil Rights Act of 1871 provided for exclusive federal jurisdiction. 17 Stat. 13. With the codification of 1874, the substantive and jurisdictional portions of the Act were separated and placed in different titles, and the phrasing of the jurisdictional paragraphs was consequently altered so that they might be comprehensible standing alone. See R.S. §§ 563 (12), 629 (16). But there is no evidence that, in enacting the Revised Statutes of 1874, the Congress intended to change the meaning of the law. And 28 U.S.C. § 1343, as it stands today, provides for "original jurisdiction" in federal district courts as clearly as it is possible for words to do.

Professor Herbert Wechsler, after discussing with approval the doctrine of "equitable abstention" by federal courts in federal question cases, goes on to say:

> "These observations call for qualification in one instance: the rights of action specially conferred by Congress in the Civil Rights Laws. There Congress has declared the historic judgment that within this precious area, *often calling for a trial by jury*, there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern."
>
> Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 *Law & Contemp. Prob.* 216, 230 (1948) (Emphasis supplied).

This Court, in a damage action under the very section invoked here, said:

> "Barring only exceptional circumstances . . . or explicit statutory requirements . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts."
>
> *Lane* v. *Wilson*, 307 U.S. 268, 274 (1939).[8]

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[8] Such "exceptional circumstances" are presented when resolution of a federal constitutional question depends upon the meaning of a state statute which has not yet been authoritatively construed by the state courts. Even then, the district court should not dismiss the complaint; its proper course is to stay proceedings pending the outcome of state litigation to secure an interpretation of the state statute involved. Harrison v. N. A. A. C. P., 360 U.S. 167, 177, 179 (1959).

In the case at bar, petitioners' rights were not violated by a state statute. They were violated by the brute force of state officers acting, as respondents admit, "in the performance of a governmental function." (R. 18). There is nothing for the state courts to construe. Petitioners have therefore invoked the remedy which Congress has clearly, simply, and explicitly given them. *Cf.* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 283-85 (1913).

The Ninth Circuit has drawn the obvious inference:

> "[The] obvious purpose of the civil rights legislation [is] to give the litigant his choice of a federal forum rather than that of a state."
>
> *Romero* v. *Weakley*, 226 F. 2d 399, 401 (1955).

The language of the statute itself is clear and disposes of the issue.[9]

3. The "Specific Intent" Doctrine of Screws v. United States is Inapplicable to Civil Actions under R.S. § 1979.

The complaint at bar does not allege that respondents acted with specific intent to deny petitioners their constitutional rights. Although respondents have never raised this omission as a defense, we will discuss it, since it was an important issue in *Screws* v. *United States*, 325 U.S. 91 (1945).

In *Screws*, this Court reviewed the federal conviction of a Georgia sheriff who had beaten his prisoner to death. The Government convicted Screws under a Criminal Code provision which, like R. S. § 1979, forbids violation of "rights . . . secured . . . by the Constitution. . . ." 18 U.S.C. § 242.[10] Unlike R. S. § 1979, Section 242 requires that the violation be "willful."

Sheriff Screws contended that § 242 was unconstitutionally vague, asserting that the section "lacks the basic

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[9] Appendix B, pp. 77-83, contains excerpts from the legislative history demonstrating (1) that Congress intended the Act to have nationwide application, and (2) that policy considerations still relevant today formed the basis for the congressional decision to confer *federal* jurisdiction in civil rights cases without regard to the possible existence of state causes of action arising out of the same facts.

[10] Section 242 was, at the time of *Screws*, found at 18 U.S.C. § 52.

specificity necessary for *criminal* statutes under our system of government." 325 U.S. at 96 (Emphasis supplied). Faced with a serious constitutional problem raised by the sweeping construction of the statute below, this Court avoided holding § 242 void for vagueness by restricting its application. The Court pointed to the word "willfully" in § 242. It read "willfully" as imposing a requirement of "a specific intent to deprive a person of a federal right made definite by decision or other rule of law. . . ." 325 U.S. at 103.

The complaint at bar alleges violation of a constitutional right "made definite" in *Wolf* v. *Colorado*, 338 U.S. 25 (1949). It does not allege "specific intent." It does not have to. On this issue *Screws* is distinguishable.

Section 242 contains the word "willfully." Section 1979 does not. Congress added "willfully" to § 242 to make it "less severe." See 325 U.S. at 100.[11] It did not so amend § 1979.

Moreover, the fifth amendment objections to § 242, which led to the restrictive holding of *Screws*, are not applicable to § 1979, because § 1979 is not a criminal statute. It is a civil statute. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters* v. *New York*, 333 U.S. 507, 515 (1948). Accord: *Levy Leasing Co.* v. *Siegel*, 258 U.S. 242, 250 (1922). "The basis for this distinction is evident. It is . . . a more serious matter to deprive a man of his liberty on a prosecution based upon a vague and indefinite statute than to deprive him of a property right alone." *General Construction Co.* v. *Connally*, 3 F. 2d 666, 667 (W.D. Okla. 1924), aff'd, 269 U.S. 385 (1926). Accordingly, the Third Circuit,

[11] See 43 Cong. Rec., 60th Cong. 2d Sess., p. 3692 (——).

after carefully analyzing the *Screws* opinion, has concluded:

> ". . . R.S. § 1979 which creates a civil liability for a tortious act cannot be held too vague to meet the test of the Fifth Amendment because it does not refer to the state of mind of the tort-feasor."
>
> *Picking* v. *Penn. R. Co.*, 151 F. 2d 240, 249 (3d Cir. 1945).

No unfairness can result to respondents as a consequence of this Court's refusal to impose the strict criminal standard of "specific intent" laid down in *Screws*. Tort liability for unreasonable searches and seizures by law officers has existed at least since the 18th Century. *Entick* v. *Carrington*, 19 How. St. Tr. col. 1029 (K.B. 1765).[12] The fact that we have embodied the common law prohibition in our Constitution and that Congress has made a federal forum available to protect the right, should not operate to *increase* the burden of the plaintiff who has been wronged. No sane police officer could imagine that the law permits the deeds done to petitioners. Cf., *Lambert* v. *California*, 355 U.S. 225, 230-32 (1957) (dissenting opinion).

In any event, the rule of *Screws* is a rule of proof, not of pleading. No specific intent was laid in the *Screws* indictment. See 325 U. S. at 93. The reversal in *Screws* was for error in instructing the jury. 325 U.S. at 107. Since

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[12] This, without more, serves to distinguish Small v. American Sugar Refining Co., 267 U.S. 233, 239-40 (1925) from the case at bar. The statutory standard in Small was in the teeth of the common law. Compare the statement in Lorenson v. Superior Court, 35 Cal. 2d 49, 60, 216 P. 2d 859, 866 (1950):

> "Although higher standards will be required of penal than of civil statutes . . . a statute is sufficiently certain if it employs words of long usage or with a common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ. . . ."

indictments in criminal cases are construed more strictly than are complaints in civil cases, it follows a fortiori that the complaint is not vulnerable on the "specific intent" issue:[13]

> "[It is] the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
>
> *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

• • •

"The basic political problem of a free society is the problem of controlling the public monopoly of force. All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty." Professor Monrad Paulsen, "The Exclusionary Rule and Misconduct by the Police," ..... *J. Crim. L., C. & P.S.* ....., ... (1960).[14]

The counts of the complaint alleging violation of R.S. § 1979 by the individual police officer respondents are good and should have been sustained.

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[13] *Accord*, Anderson v. Myers, 182 Fed. 223, 229-30 (C.C.D. Md. 1915), *aff'd.*, 238 U.S. 368 (1914); Brickhouse v. Brooks, 165 Fed. 534, 543-44 (C.C.E.D. Va. 1908). *Contra*, Dye v. Cox, 125 F. Supp. 714 (E.D. Va. 1954).

[14] Article scheduled for publication this year; manuscript available at the office of Prof. Claude Sowle, Northwestern University College of Law.

The potential for tyranny which inheres in the unrestrained power of the police to enter private homes at will is illustrated by an almost forgotten incident. Professor Lasson has recounted it:

B. THE QUESTION OF LIABILITY UNDER R.S. § 1980 AND R.S. § 1981.

Petitioners are of the opinion that the facts stated in the complaint present a cause of action under R.S. § 1979. Whether they present a cause of action under R.S. § 1980 and § 1981 is less certain. It may be that R.S. §§ 1980 and 1981 were intended and should be construed to apply to a different type of fact situation. If petitioners are entitled to recover under R.S. § 1979, claims under R.S. §§ 1980 and 1981 would be superfluous. If petitioners are not entitled to recover under R.S. § 1979, R.S. §§ 1980 and 1981, as applied to the allegations of the complaint, would be of no value. (Our reasons for granting the writ in the petition for certiorari were grounded entirely upon R.S. § 1979.)

Petitioners therefore limit their claim to recovery in this case to the liability imposed by R.S. § 1979.

(Footnote 14 continued)

". . . the most outstanding of these instances was the case of Sir Edward Coke, the . . . most influential of the Crown's opponents. On the theory that certain works in preparation contained matter prejudicial to the prerogative, that seditious papers were in circulation among the popular party, and that this was an opportune time to discover them and to strike a telling blow, the Privy Council in 1634, when Coke was on his deathbed, sent a messenger to his home with an order to search for 'seditious and dangerous papers.' Practically all of his writings, including the manuscripts of his great legal works, his jewelry, money, and other valuables, and even his will, were seized under that warrant and carried away. His chambers at the Inner Temple were ransacked in the same manner. The havoc wrought by the custodians of these papers was wanton, and seven years elapsed before what remained was restored to his heirs at the request of the Long Parliament. His will, of great importance to his family, was never returned."

Lasson, The History and Development of the Fourth Amendment to the United States Constitution 31-32 (1937).

II.

THE LIABILITY OF THE CITY OF CHICAGO.

The complaint asserts the liability of the City of Chicago. This issue is one of the questions presented here. (Petition for Certiorari, p. 3). The courts below did not reach this question (R. 30, 33). It should, however, be resolved by this Court, since it is solely an issue of law and must necessarily arise upon a trial of this case. Cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958).

The individual respondents were, at the time of the wrongs complained of, "duly appointed, qualified and acting police officers . . . of the defendant City . . . ." They were all "agents of the . . . City," and were "acting in the course of their employment . . . ." (R. 1). The City of Chicago is a municipal corporation (R. 1, 18) which "may sue and be sued." Ill. Rev. Stat., Ch. 24 §2-9 (1959).[15]

The theory of the complaint is that under the circumstances here alleged the City is liable for the acts of its police officers, by virtue of *respondeat superior*. The City asserts that it is immune from suit under the Illinois doctrine of sovereign immunity because its police, in violating the Monroe home, were "in the performance of a governmental function." [16] (R. 18, 29).

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[15] The City of Chicago is bound by the provisions of Chapter 24. Bullis v. City of Chicago, 235 Ill. 472, 475 (1908).

[16] Illinois has abandoned the immunity doctrine as of Dec. 16, 1959, at least insofar as cities are concerned. *Compare* Molitor v. Kaneland Community School District, 18 Ill. 2d 11 (1959), *with* Peters v. Bellinger, 19 Ill. 2d 367 (1960).

Congress, acting by virtue of the enabling clause of the fourteenth amendment and the "necessary and proper clause" of article I, *may*, if it chooses, subject municipalities to suit for due process and equal protection violations by their officers "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[17] *United States Constitution*, Amend. 14, §5; Art. 1, §8, cl. 18; Art. VI, par. 2. Accord, *California* v. *United States*, 320 U.S. 577, 586 (1944) (Shipping Act of 1916); *United States* v. *California*, 297 U.S. 175, 184, 185 (1936) (Safety Appliance Act); *Frame* v. *City of New York*, 34 F. Supp. 194, 196 (S.D.N.Y. 1940) (Jones Act). The case at bar presents the question whether Congress *did* impose such liability when it enacted R.S. §1979. This is the first time this issue has been presented for decision in this Court.

The framers of §1979 did not discuss the question of *respondeat superior*. Thus, no matter which way the Court decides this issue, to some extent it will be making law. such "interstitial legislation" is proper because it is unavoidable.

We contend that the statute should be construed liberally so as to insure maximum protection for individual liberties. Respondents contend that it should be construed narrowly so as to incorporate Illinois common law doctrine restricting the individual's right to sue municipal corporations.

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[17] No provision of the Constitution forbids Congress to impose liability upon municipal corporations. The eleventh amendment is not applicable here. Lincoln County v. Luning, 133 U.S. 529 (1890), and the City has never argued that it is.

A. PRESUMPTIVELY, THE OBSOLETE DOCTRINE OF "SOVEREIGN IMMUNITY" SHOULD NOT BE ENGRAFTED UPON R. S. § 1979; THE BURDEN OF PERSUASION IS UPON THE CITY TO SHOW WHY THIS COURT SHOULD EXEMPT IT FROM THE STATUTE'S OPERATION.

Petitioners' argument on this point will, in many respects, parallel the argument of the Solicitor General of the United States in *United States* v. *Alabama*, No. 398, October Term, 1959. See, in particular, Brief for the United States in that case, pp. 35-40.

The framers of R.S. §1979 intended that it be given the most liberal possible construction. In the initial speech on the bill, its sponsor, Rep. Shellabarger of Ohio, stated:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficiently construed. . . . *The largest latitude consistent with the words employed* is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Globe*, Appendix 68 (March 28, 1871) (Emphasis supplied).

In the light of this unequivocal declaration by the Act's sponsor, it would be unreasonable to assume, without positive evidence, that Congress, *sub silentio*, intended to immunize municipal corporations from the prohibition of the statute.[18]

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[18] Cf. Rep. Monroe, Ohio, *Globe* 370 (March 31, 1871):

> "We feel that we ought to find in such an instrument protection for the people; that we have a right to take some pains to find it there; and that, in case of obscure or ambiguous phrases we should give to the natural rights of man the benefit of the doubt."

Rep. Monroe was speaking of the fourteenth amendment. His remarks typify the attitude of R. S. § 1979's supporters.

Our contention is reinforced by the best traditions of Anglo-American constitutionalism: in 1602, when the notion that "The King can do no wrong" was more widely accepted that it is today, the House of Lords laid down the law:

> "In divers cases the King is bound by act of parliament, although he be not named in it, nor bound by express words. And therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named; for religion, justice, and truth are the sure supporters of the crowns and diadems of kings . . . ."
>
> *The Case of Ecclesiastical Persons,* Coke, Part V, p. 14a, 14b, 77 Eng. Rep. 69 (1602).[18a]

In any event, the occasionally invoked presumption that the sovereign is not intended to be bound by his own acts, applies only to the *enacting* soverign. *California* v. *United States,* 46 F. Supp. 474, 478 (N.D. Cal. 1942), aff'd, 320 U.S. 577 (1944). See *United States* v. *California,* 297 U.S. 175, 186 (1936). The City of Chicago is not the enacting sovereign in this case.

On May 4, 1959, a unanimous Court brushed aside objections based upon an alleged presumption that municipal corporations are not bound by federal statutes:

> "Respondents . . . claim . . . that a political subdivision must be expressly included in a statute if it is to be considered within the law's coverage . . . . But this Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law."
>
> *Plumbers of Local* 298 v. *County of Door, a Municipal Corporation,* 359 U.S. 354, 359.

[18a] The significance of this case for American law is discussed in elaborate detail in the Solicitor General's Brief for the United States, in United States v. Alabama, No. 398, October Term, 1959, at pp. 37-39 thereof.

Under these circumstances, the burden is upon the City to demonstrate in the clearest and most convincing manner that municipal corporations are exempt from the Act.

B. THE ONLY NATURAL INFERENCE FROM THE THE LANGUAGE, PURPOSE, FUNCTION, AND LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS STATUTE, IS THAT MUNICIPAL CORPORATIONS ARE LIABLE IN CIVIL ACTIONS BROUGHT UNDER THESE ENACTMENTS.

Revised Statutes §1979 makes liable in damages "every person" who violates the constitutional rights of another while acting under color of law.

(1) Petitioners contend that the rule of *respondeat superior* is so ancient and basic a legal concept and is so obviously related to the purpose and function of the Fourteenth Amendment and its enforcement legislation, that it must be considered part and parcel of R.S. §1979, even if the words "every person" are thought to refer merely to human individuals.

(2) In the alternative, petitioners contend that the statutory words "every person" include municipal corporations.

1. Respondeat Superior Is Implicit in the Statute.

We deal with a broadly phrased remedial statute which is to be construed liberally.

Section 1979 was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment . . . ." 17 Stat. 13 (1871). The fourteenth amendment explicitly proscribes action by states. It would therefore seem, without more, that the implementing statute must apply to state municipal corporations. The implication seems clear:

> "[T]he provisions of the [Fourteenth Amendment] . . . are generic in their terms, are addressed, of course, to the States, but also to *every person*, whether natural or *juridical*, who is the repository of state power."
>
> *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 286 (1913) (Emphasis supplied).

As if to make assurance doubly sure, this Court repeated its point:

> "[T]he Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its *comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed.*"
>
> 227 U.S. at 288. (Emphasis supplied).

A concurring opinion in *Screws* v. *United States*, 325 U.S. 91, 115-16 (1945) reaches the indicated conclusion in the context of the Civil Rights Acts:

> "Abuse of state power was the target. Limits were put to state authority and states were forbidden to pass them, by whatsoever agency. It is too late now, if there were better reason than exists for doing so, to question that *in these matters abuse binds the state and is its act*, when done by one to whom it has given power to make the abuse effective to achieve the forbidden ends."
>
> *Screws* v. *United States*, 325 U.S. 91, 115-116 (1945) (Emphasis supplied).

If "abuse binds the state and is its act," then it seems to us that the corporate agency of the state which acted, should pay.

In short, this Court should do here what it did in *United States* v. *A & P Trucking Company*, 358 U.S. 121 (1958), where it read *respondeat superior* into a penal statute defining a criminal offense, under circumstances in which the "*superior*" was not even a legal entity, and at common law would clearly not have been subject to what the dissenters termed "vicarious criminal liability." See 358 U.S. at 125 and 128. The Court's description of "the policy to be served" in *A & P Trucking*, is relevant here:

> "The business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment. Thus pressure is brought on those who own the entity to see to it that their agents abide by the law."
>
> 358 U.S. at 126.

Thus, no legal and historical exegesis of the words "every person" is necessary. Even if the word "person" refers only to individuals, the fourteenth amendment and the Act are pregnant with *respondeat superior*—a doctrine which is not new, not unjust, and is as basic to every lawyer's thinking now as it was in 1871. *Qui facit per alium facit per se.* See *Jones* v. *Hart*, Holt, K.B. 642, 90 Eng. Rep. 1255 (1698).

2. The City Is a "Person" within the Meaning of the Statute.

The statute makes "every person" liable. Does the word "person" include cities? Congress has said that it may.

The leading sponsor of R.S. §1979 said that it does. The very first case construing the statute said, by implication, that it does. This Court, by necessary implication, has *held* that it does.

(a) What Congress said.

Just seven weeks before it passed R.S. §1979, Congress adopted "An Act Prescribing the Form of the Enacting and Resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof." Act of Feb. 25, 1871, 16 Stat. 431. Concerning this act, it has been said:

> "Sometimes Congress supplies its own dictionary. It did so in 1871 in a statute defining a limited number of words for use as to all future enactments."
>
> Frankfurter, "Some Reflections on the Reading of Statutes," 47 *Colum. L. Rev.* 527, 536 (1947).

This statute provided, in section two, that:

> ". . . [T]he word 'person' may extend and be applied to bodies politic and corporate . . . unless the *text* shows that such words were intended to be used in a more limited sense . . . ."
>
> 16 Stat. 431 (1871) (Emphasis supplied).[19]

Nothing in the *text* of R.S. § 1979 indicates any congressional intent to limit its applicability. As we have shown, there is much to indicate otherwise.

The City of Chicago is now and always has been a "body politic and corporate." Ill. Rev. Stat., Ch. 24, § 2-9 (1959);

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[19] The lineal descendant of this statute is found at 1 U.S.C. § 1. The statute now reads: " . . . unless the *context* indicates otherwise." (Emphasis supplied). Conceivably, this change is significant.

It should be noted that 1 U.S.C. § 1 was possibly decisive in the A & P Trucking case, see 358 U.S. at 123, 124, just as we believe its grandfather should be here.

Act of Feb. 11, 1835, Laws of Illinois, 1835, p. 204.[20] We need go no further. There is a strong presumption that Congress knew what it was doing and meant what it said.[21] "[T]he largest latitude consistent with the words employed . . . ." is the mandate for construction of the Act which we have from its sponsor. Rep. Shellabarger, Ohio, *Globe*, Appendix 68 (March 28, 1871). What follows merely gilds the lily. We think it irrelevant, but acknowledge the possibility that others may disagree.

(b) *What Rep. Shellabarger said.*

The relevance of the "dictionary statute" of Feb. 25, 1871 is highlighted by a statement of § 1979's sponsor, Rep. Shellabarger of Ohio:

> "... [C]ounties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States. (See *Louisville Railroad Company* v. *Letson*, 2 Howard, 497, &c.)"
>
> *Globe* 752 (April 18, 1871).

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[20] The fact that municipal corporations were commonly understood to be "bodies politic and corporate" at the time R.S. § 1979 was adopted, is demonstrated by the 58 pre-1871 statutes collected in Appendix D (pp. 107-10) to this brief.

[21] Cf. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson and Minton, J.J. concurring).

Minutes later, Shellabarger reiterated his point, saying of municipal corporations and counties that:

> "... they being, under well-recognized United States law, a person in the courts; it is perfectly competent to enforce a judgment for such a liability in the same manner as could any other judgment be enforced against the same legal person or corporation."
> *Globe* 752.[22]

(c) *What an 1873 federal court said.*

The judges of the era in which R.S. § 1979 was passed saw nothing incongruous in holding that a corporation was

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[22] Rep. Shellabarger was addressing himself to the so-called "Sherman Amendment," a grotesquely worded provision which was appended to the bill by the Senate without debate after the bill had already passed the House. The Sherman Amendment sought to make every "county, city, or parish" liable for various injuries inflicted by mobs of *private individuals*. It contained no "color of law" provision. *Globe* 705. The amendment was ultimately dropped after the House twice non-concurred. See *Globe* 725, 728, 779, 800, for the votes. Some Senators did debate the amendment after the House initially rejected it.

Opposition to the amendment centered upon the patent unconstitutionality and injustice of subjecting cities and counties to liability for the actions of private individuals whom they did not control or direct. See *Globe* 759, 762, 777, 788. Only Sen. Stevenson of Kentucky addressed himself systematically to the idea that municipalities were immune from tort liability. *Globe* 762. Sen. Stevenson also opposed the amendment on the constitutional grounds urged by the other speakers. He was paired against the bill as a whole on the final Senate vote, even though the Sherman Amendment had been dropped, and R.S. § 1981 substituted. *Globe* 831. Most of the speeches against the Sherman Amendment were made by Democrats who opposed passage of *any* bill. *Cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951):

> "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

a statutory "person."[23] In what appears to have been the very first reported decision construing R.S. § 1979, the Circuit Court for the Northern District of Illinois dealt with the question:

> "One of the objections made to the jurisdiction of the court is that this law refers to persons, and it is said they must be natural persons, and that—this being a statute passed under the provisions of the fourteenth amendment of the Constitution—Congress did not intend to include corporations by this language . . . .
>
> ". . . . .
>
> "Why, . . . if a corporation as such, under color of any law . . . should subject . . . any person . . . to the deprivation of any rights . . . secured by the Constitution . . . should not the individual have redress against the corporation? And yet the language of the law is 'a person,' and not a corporation. Why should a party be protected if the wrong was done by a person, and not protected if it was done by a corporation, where it is a question as to the jurisdiction of a court? Why,

[23] Holdings that corporations, both public and private, were "persons" within the meaning of various statutory and constitutional provisions were not uncommon in the years prior to 1871. See, *e.g.*, dealing with governmental bodies, Rains v. City of Oshkosh, 14 Wis. 403 (*372), 405, 406 (*372, *374) (1861); Bray v. Town of Wallingford, 20 Conn. 416, 418 (1850); Martin v. State, 24 Tex. 61, 68 (1859). Also see State v. Herold, 9 Kans. 134 (*194), 137 (*199) (1872).

This Court had firmly established the principle that a corporation might be a "person" within the meaning of various constitutional and statutory provisions, prior to 1871. See, *e.g.*, Louisville, Cincinnati & Charleston R. R. Co. v. Letson, 2 How. 497, 555, 558 (1844); Beaston v. Farmer's Bank of Delaware, 12 Pet. 102, 105 (1838); United States v. Amedy, 11 Wheat. 392, 412 (1836).

As might be expected, many states, prior to 1871, had enacted "dictionary statutes" providing that the word "person" might be construed to include "bodies politic and corporate." See the collection of pre-1871 state statutes defining "person" in Appendix E (p. 111) to this brief. Thus, it clearly appears that "person" was a word of art in 1871, just as it is today. *Cf.* United States v. A & P Trucking Co., 358 U.S. 121, 123, 124, 128 (1958).

in other words, cannot the court treat a corporation, if that does the wrong, as a person, precisely as the courts have always treated a corporation as a citizen, for the purpose of maintaining jurisdiction, where rights are affected?

"• • • •

"[I]nasmuch as I think where if the wrong was done *by* a corporation there would be a remedy under the statute, I also think that where the wrong is done *to* the corporation . . . the same right is given to the corporation."

Northwestern Fertilizing Co. v. *Hyde Park*, Fed. Cas. No. 10,336; 3 Biss. 480, 482, 483 (1873).

In a footnote, the court cited the "dictionary statute":

"See Sec. 2, Act of February 25, 1871, 16 U.S. Statutes at Large, 431." 3 Biss. at 438 note.

Although these statements of the court had reference to private corporations, it is noteworthy that the defendant in *Northwestern Fertilizing* was a municipal corporation: the Village of Hyde Park. Neither the court nor the litigants appear to have doubted that the village came within the statutory phrase "every person."[24] (As we shall show later on, the distinction between private and public corporations which seems so clear today, was somewhat blurred in the minds of many lawyers during the Civil War era. See pages 47-48 of this brief.)

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[24] It was quickly established that a corporation is a "person" for purposes of the due process clause of the fourteenth amendment. Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394, 396 (1886). See the extended discussion in The Railroad Tax Cases, 13 Fed. 722, 757-61 (C.C.D.Cal. 1882).

(d) *What this Court, by necessary implication, has held.*

In a number of cases this Court has held that municipal corporations are within the terms of R.S. § 1979. See, for example, *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) and *Douglas* v. *City of Jeannette*, 319 U.S. 157, 161 (1943). These were equity cases and "sovereign immunity" was not discussed. But, necessarily, these cases hold that a municipal corporation is within the phrase "every person," because otherwise no cause of action under R.S. § 1979 would exist.

Section 1979 gives "an action at law, suit in equity, or other proper proceeding for redress" against "every person" who violates the Constitution under color of law. Thus, the equitable relief portion of § 1979 modifies *the very words*—"every person"—which the "action at law" provision invoked in the case at bar modifies. In the light of the policy considerations discussed in the next section of this brief, as well as the congressional mandate for liberal interpretation of the Act, we suggest that this Court should not hold that the identical words in § 1979 mean one thing in equity and something else at law, because such a holding would hurt injured plaintiffs, not help them.

It is perhaps relevant to note that in other areas of federal legislation this Court has held governmental bodies to be "persons." *Plumbers of Local* 298 v. *County of Door, a Municipal Corporation*, 359 U.S. 354, 359 (1959); *California* v. *United States*, 320 U.S. 577, 585 (1944); *Georgia* v. *Evans*, 316 U.S. 159, 162 (1942); *Ohio* v. *Helvering*, 292 U.S. 360, 370-71 (1934); *Metropolitan R. Co.* v. *District of Columbia*, 132 U.S. 1, 10 (1889). Indeed, this Court has gone so far as to construe "person" in a *crim-*

inal statute to include "an amorphous group of individuals" which was not a legal entity. *United States* v. *Shirey*, 359 U.S. 255, 257 (1959).[25]

It may be that the foregoing arguments are not conclusive as to municipal liability under R.S. § 1979. But, at least, we think it reasonable to assert that they open the door to consideration of the policy questions which inhere in this issue of statutory construction. We suggest that the history and wisdom of the sovereign immunity doctrine is, at this point, relevant.

C. ALL DOUBTS AS TO THE LIABILITY OF THE CITY UNDER THE ACT SHOULD BE RESOLVED IN PETITIONERS' FAVOR BECAUSE THE DOCTRINE OF IMMUNITY IS NOT WELL GROUNDED IN HISTORY OR REASON.

Considerations of public policy should be influential in construing the generalities of R.S. § 1979. In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), this Court held that state legislators, acting within the scope of their duties, were immune from liability under § 1979. In so holding, the majority opinion laid heavy emphasis upon "[t]he reason for the privilege" and the fact that legislative immunity

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[25] "Whether the word 'person' in a particular statute includes a particular body, a corporation, or association is essentially a matter of construction of that statute, *aided, where possible, by general statutory definitions*. If the purpose of a statute is such as to dictate the inclusion of a particular body within its scope then the statute is generally so interpreted." 359 U.S. at 257 n. 2 (Emphasis supplied).

It is of possible significance that, in enacting R.S. § 1979, Congress did *not* deem it necessary explicitly to add "firm" and "corporation" to secure the inclusion of these entities. *Cf.* United States v. Shirey, 359 U.S. at 269 (dissenting opinion); Georgia v. Evans, 316 U.S. 159, 163-64 (1942) (dissenting opinion).

stemmed from "a tradition . . . well grounded in history and reason . . . ." 341 U.S. at 373, 376. Justice Black, concurring, again noted that the legislative privilege was based on a "long-standing and wise tradition. . . ." 341 U.S. at 379.

We shall show that the doctrine of sovereign immunity, as applied to municipal corporations, is a "tradition" neither long-standing nor wise. It is "well grounded" neither in history nor in reason.

1. The Rule of Immunity Is Not Well Grounded in Reason.

The City's burden of persuasion to show that it is exempt from the operation of § 1979, becomes almost impossible when the inherent injustice of municipal immunity is considered in the light of the function and purpose of the fourteenth amendment.

"The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that 'the King can do no wrong'. . . ." Borchard, "Government Liability in Tort," 34 *Yale L.J.* 1 (1924). Of course, this "reason" is in the teeth of our public philosophy. The fourteenth amendment and the bill of rights were passed on the precise theory that the King (or the Government) *can* do wrong and must be inhibited by legally enforceable guarantees.[26]

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[26] The very basic conflict as to the nature of "sovereignty" between those who believe in the rights of man and those who do not, is illustrated by a colloquy which took place during the Japanese Privy Council debate on adoption of the Imperial Constitution of 1890. The chairman and a councillor, Mr. Mori, are speaking:

"Mr. Mori (with an air of indignation): 'Chairman! I object to the wording 'the rights . . . of the subjects.' It is repugnant to our national tradition. We Japanese subjects may be bestowed with limited status of responsibility to the Emporer, but never with rights.' (Footnote cont., p. 36.)

"Prince Ito (calmly): 'Your argument rejects the theories constitutional law. A main objective of making a constitution

America has no King. And if it ever had a public policy of municipal irresponsibility, that policy is discredited and the doctrine is everywhere dying or dead. We have seen too much in the Twentieth Century of the grim results of the exalted power of irresponsible government in Europe and Asia, to be indifferent to the moral issues raised by the imumnity rule. The seathing attack by Professor Borchard, in which every conceivable justification for the rule's continued existence was conclusively refuted, has done its work.[26a] The unaccustomed fervor of published denunciation of the rule by conservative courts and commentators is but a reflection of a deeply felt necessity of our times that justice be done and the callous formulas of other days

(Footnote 26 continued)

exists, in the first place, in the limitation of the sovereign power, and secondly in the protection of the people's rights. If not so, the sovereign will have infinite and uncontrolled power, whereas the people will owe unlimited responsibility to it. Such is an absolute monarchy. If we eliminate the bill of rights from the constitution, how can it be a protector of our people?"

Haruo Abe, "Some Observations on the Protection of Human Rights against Illegal Criminal Investigation in Japan," —— J. Crim. L., C. & P.S. ——, —— (1960) (Article scheduled for publication within the next year; manuscript available at the office of Prof. Claude Sowle, Northwestern University College of Law; the quotation appears at p. 3 n. 2 of the manuscript).

Things have changed in Japan. The State may now be sued for damages for wrongful police actions. Constitution of Japan, Art. 17 (1946); State Liability Law (Law No. 125, Oct. 27, 1947). Sixty-nine such civil damage actions were brought by Japanese citizens between October 1947 and April 1954. Abe manuscript, p. 22.

These changes are said to have resulted from [t]he bitter memory of police brutality in pre-war Japan . . . " Abe manuscript, p. 16. Now the Japanese say:

"Allow the police seven miles and they will go nine miles; therefore, if we want to keep them at seven miles, better give them six miles."

Abe manuscript, p. 21.

[26a] See Borchard, 34 Yale L. J. 1, 129, 229 (1924-25); 36 Yale L. J. 1, 757, 1039 (1926-27); 28 Colum. L. Rev. 577, 734 (1928); 20 A.B.A.J. 747 (1934).

be not allowed to strait-jacket the judicial process. Thus, Dean Harno:

> "The rule is socially indefensible . . . . All the reasons . . . advanced for upholding it are fallacious . . . the courts should cease dealing in empty fictions and substitute therefor good sense."
>
> Harno, "Tort Immunity of Municipal Corporations," 4 Ill. L.Q. 28, 31 (1921).

Thus, the Florida Supreme Court:

> "To continue to endow [the municipal corporation] with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice."
>
> *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

Thus, the Illinois and New Mexico Supreme Courts:

> "The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age . . . the medieval absolutism supposed to be implicit in the maxim, 'the king can do no wrong,' should exempt the various branches of the government from liability for their torts . . . ."
>
> *Molitor* v. *Kaneland Community School District*, 18 Ill. 2d 11, 21 (1959), quoting *Barker* v. *City of Santa Fe*, 47 N.M. 85, 88, 136 P. 2d 480, 482 (1943).

Thus, in more measured terms, a West German lawyer who has lived under more than one form of twentieth century government:

> "For a foreigner it is somewhat astonishing to see how little responsibility the state has assumed . . . in the United States. In this country, where civil liberties are usually guarded with so much jealousy . . . the citizens' remedies against the government for torts are far inferior to those afforded . . . in other countries . . . .

"What justification is there . . .? . . . [H]ow can it be justified that one innocent individual should bear the injury tortiously inflicted upon him in the course of activities for the benefit of the state? It is difficult to see why he alone should suffer merely on the ground that his interest happened to stand in the way of a governmental employee's actions. Should he not enjoy equal protection of the law with every other member of the community? . . . [I]t seems unfair . . . ."

Rolf Braband, "Liability in Tort of the Government and Its Employees: A Comparative Analysis with Emphasis on German Law," 33 *N.Y.U.L. Rev.* 18, 48-49 (1958).[27]

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[27] Compare the statement by the Chief of the Berlin Criminal Police in 1934, quoted in Kaufmann, *Der Polizeiliche Eingriff in Freiheiten und Rechte* [The Police Encroachment upon Liberties and Rights] Frankfort/Main 78 (1951). In commenting upon a Weimar Republic court decision which held that arrested persons must be promptly brought before a magistrate in accordance with a Code requirement that such production be "without delay," the Nazi Chief said,

> "that an end had to be put to the excessive esteem of individualistic interests and neglect of collectivistic interests which had carried fatal irresolution into the ranks of the police, hamstringing many of them in the impetus of the first action. Not only had the constitutional protection of the right of liberty to be take into account, but much the more so the State's general interest in the interpretation of the words 'without delay.' For this very reason the arrestee would often have to put up with a police detention in excess of the 24-hours limit. On this a clear legal rule must be demanded."

Compare the statement of Edgar E. Scott, Deputy Chief of Police and Chief of Detectives of the Metropolitan Police Dept. of Washington, D.C., with reference to Mallory v. United States, 354 U.S. 449 (1957):

> "Now, some of the people who seem to be afraid of remedial legislation have been screaming about the Constitution, due process of law, the Bill of Rights, and probable cause, and so forth, the truth is, of course, that none of these things are involved in the Mallory decision. The only thing involved is the interpretation of Rule 5(a). Such references to rights which we all hold sacred become excellent tools in the hands of those who would throw up a smoke-screen to obscure the real issue here.

[Footnote cont. p. 39]

Thirty years ago, the trend was already apparent:

> An overwhelming opinion throughout the world in favor of the assumption of community liability for the torts of public officers may be regarded as representing a growing moral conviction to which the courts should not remain impervious."
>
> Comment, "Municipal Responsibility for the Torts of Policemen." 42 *Yale L. J.* 241, 244-45 (1932).

Thirty-three scholarly books and articles attacking the injustice of the immunity doctrine were massed in support of this statement. 42 *Yale L. J.* at 244-45 n.17. Dozens more, published between 1932 and 1942, are collected in Repko, "American Legal Commentary on the Doctrine of Municipal Tort Liability," 9 *Law & Contemp. Prob.* 214 (1942). More recent additions to this flood of criticism are collected in Smith, "Municipal Tort Liability," 48 *Mich. L. Rev.* 41 (1949). Professors Fuller and Casner of the Harvard Law School have appropriately concluded:

> "Legal scholars . . . have long since made it plain that sovereign immunity has no proper place in the life of a municipal corporation."
>
> Fuller & Casner, "Municipal Tort Liability in Operation," 54 *Harv. L. Rev.* 437 (1941).

This Court has itself been astute in construing statutes to avoid the unjust consequences of sovereign immunity, noting a "steadily growing policy of governmental liability"

(Footnote 27 continued)

> "I personally, think it would be well to examine some of these persons to see what selfish interest they might have in seeking to make it easy to get criminals off."
>
> "Confessions and Police Detentions," Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. at 125 (1958).

When responsible police leaders take such attitudes as this, right out in public, the importance of a meaningful civil remedy—which means municipal responsibility—becomes evident.

resulting from "expanding conceptions of public morality regarding governmental responsibility . . . ." *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 279 (1959); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 396 (1939).

The reasons for this universal condemnation are clear enough: (a) immunity is unjust to the individual victim of a municipal tort; (b) immunity is unjust to the individual employee who commits a municipal tort; (c) immunity is unjust to the community as a whole.

(a) *Immunity is unjust to the individual victim of a municipal tort.*

The community receives the benefits of municipal operations, "governmental" or otherwise.[28] It should therefore pay the cost and spread the risk of injury from torts resulting from such municipal operations. To throw the entire burden upon the innocent, injured individual is unreasonable, unjust, and bad social policy:

> "It is absolutely certain that in connection with their functioning, the state and each of its subdivisions will injure a certain number of individuals. The burden of this injury should be considered a legitimate public expense, incidental to carrying on the complicated public functions."
>
> Blachly and Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey," 9 *Law and Contemp. Prob.* 181, 213 (1942).

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[28] " . . . the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the 'nongovernmental'—'governmental' quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."

Indian Towing Company v. United States, 350 U.S. 61, 65 (1955).

(b) *Immunity is unjust to the individual employee who commits a municipal tort.*

The doctrine of immunity frequently operates with almost incredible harshness upon individual officers:

> "This burden, under modern conditions, should not be borne by the officer, for many reasons—the fact that his fault may be very slight and yet the results may be very serious, a situation which will mean injustice to either the officer or the injured person unless the responsibility is borne by the government: the fact that even if the officer is greatly at fault, it does not follow that he is solely so, or that the government should disclaim responsibility for his acts . . . ."
>
> Blachly and Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey," 9 *Law & Contemp. Prob.* 181, 213 (1942).

This last point is of particular significance when the institutionalized nature of civil liberties violations by metropolitan police departments is noted. See, for example, *Secret Detention by the Chicago Police: A Report by the American Civil Liberties Union, Free Press, Glencoe* (1959) (20,000 illegal incommunicado detentions in Chicago in 1956); Comment, "Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy," 47 Nw. U.L. Rev. 493, 497 (1952) (4,593 unconstitutional searches and seizures exposed *in one branch* of the Municipal Court of Chicago in 1950).

The most frightening thing about what happened to the Monroe family is *not* that they were terrorized by bad men who bore ill will against them. The sobering truth of the matter is precisely that what was done to the Monroes was

done almost casually—as part of a routine investigation. This case portrays a standard police procedure—whose victims are often innocent. This case is, among other things, a "custom or usage" case.[29]

(c) *Immunity is unjust to the community as a whole.*

It cannot be denied that the citizens who live in a city have a significant interest in their police department's operating in accord with the Constitution. If there were no such interest, we would not, with such endless pains and tribulation, have articulated in our basic public document the rights of man. These rights, of course, mean nothing if they are confined to paper. They must be lived, or they are worthless. This means that violations must not occur, not merely that they must be redressed.

Imposition of municipal liability applies deterrent pressures at the only level where they can be truly effective—the level of policy decision and command. If the City must pay for the wrongful acts of its agents, the public will quickly know of it. The resultant pressures will be reflected in the policy decisions and command performance of those who govern the City and rule its police department. Disciplinary controls will be exercised at the top—the level where it really counts in a modern big city police department which more nearly resembles a large business corporation than it does an old fashioned town constabulary. Things will change. Not only will past in-

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[29] Compare Paulsen, "Safeguards in the Law of Search and Seizure," 52 *Nw. U.L. Rev.*, 65, 75-76 (1957), with regard to the Los Angeles practice of "bugging" private homes:

> "This police conduct is not only an example of illegality, it is illegality elaborately planned with the connivance of the Los Angeles Chief of Police. It is not the case of the over-eager rookie misjudging the fine lines of the law of arrest. It is constitutional violation as a matter of police policy."

justice be redressed, but, far more important, future injustice will be prevented. "The purpose of the law . . . is to prevent such misconduct, not to put a price on it." *Secret Detention by the Chicago Police*, supra, at 17.[39]

* * * *

Professor Caleb Foote has, with specific reference to police violations of individual rights, summarized all three reasons for municipal liability in one paragraph:

> "Governmental liability is important not only to provide financially responsible Defendants, but primarily so that the deterrent will be effective where it is needed —at the level where police policy is made. If cities are responsible for torts committed by officers who are known to be vicious and ill tempered or dangerously insane or chronically alcoholic, the liability is likely to discourage the retention of such officers and compel a better police force. Most illegal arrests and searches probably arise within the scope of everyday police activity, a fact recognized by cities which allow the city attorney to defend officers sued for false imprisonment. Where the officer makes an illegal arrest under the orders of his superiors, while this may not excuse him, evidence of the fact will be admissible in mitigation of damages. However justifiable this may be as an act of justice to the Defendant, it should be irrelevant to the Plaintiff's cause of action and illustrates the desirability of enforcing the sanction at the policymaking level. Furthermore, some police illegality is an inevitable concomitant of law enforcement. The ex-

[39] It is worth recalling that Entick v. Carrington, 19 How. St. Tr. col. 1029 (1765) and the associated damage actions *stopped short* the use of the general warrant in England—and that Parliament paid the damages for constitutional violations committed pursuant to a long established English custom of searches under the general warrants. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 45, 48-50 (1937).

pense should be borne by the state, which can spread the loss where actual monetary damage results and which is in the position to control and minimize the risk."

Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493, 514 (1955).

Lon Fuller and Andrew Casner made the same point with interesting variations:

"One of the standard objections to municipal liability is that such a doctrine would tend to eliminate the officer's feeling of personal responsibility. But should the officer be judgment proof, the incentives to non-tortious conduct are in no way affected by municipal liability. Even when a judgment against him is collectible, his feeling of personal responsibility may persist despite the imposition of liability upon the municipality, for he is still subject to an action over brought by the city. In any event, the proper method for developing incentives to non-tortious conduct is through adequate administrative supervision . . . . Public safety becomes a matter of real concern to the city fathers when the city is liable for its torts . . . ."

Fuller & Casner, "Municipal Tort Liability in Operation," 54 *Harv. L. Rev.* 437, 459 (1941).

Dean Leon Green has summed up the policy factors at stake:

"There is no good reason why the basis of liability applicable to private corporations should not give municipal corporations all the protection they require. The defenses available are extensive and no one can contend that they are not ably presented and consistently upheld by the courts. Even in the most extreme case, that of injuries inflicted by police officers, the protective doctrines are adequate. If the officer is not on duty, as in the recent case of the shooting of a

sailor by two city policemen, the city is protected by the 'scope of employment' doctrine. On the other hand, if it were found that a policeman while on duty, as in the recent case of shooting a Negro boy in the back, did so either negligently or wantonly, why should the city not pay for the harm done as would a private employer? Why should the victim be required to bear the injury while the city does nothing to atone for the conduct of its unfit employee? Incidentally, if a city in such a case were held responsible, how long would it be before municipalities everywhere would be taking the same attitude towards the quality of their personnel that must be taken by private companies? The opportunity offered through civil actions for making indifferent city governments responsive to their duties is staggering."

Green, "Freedom of Litigation—Municipal Liability for Torts," 38 *Ill. L. Rev.* 355, 377 (1944).

The conclusion is apparent:

"There is no way of assuring a maximum of justice and a minimum of suffering except by the assumption of responsibility by the unit of government."

Blachly and Oatman, "Approaches to Government Liability in Tort: A Comparative Survey," 9 *Law & Contemp. Prob.* 181, 213 (1942).

2. The Rule of Immunity Is Not Well Grounded In History.

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court read into R.S. §1979 a rule of legislative privilege, because that rule was ". . . well grounded in history and reason . . . ." 341 U.S. at 376. We have realt with the "reason" of municipal irresponsibility for torts. We turn to irresponsibility's history.

Revised Statutes §1979 was passed in 1871. 17 stat. 13.

In order to assume that Congress intended, *sub silentio*, to immunize municipal corporations from liability under the Civil Rights Act of 1871, it must be first assumed that there existed at the time the Act was passed, a well-established, universally recognized American common law rule of municipal immunity which constituted one of the basic "presuppositions of our political history," *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951). Municipal immunity constituted no such thing. The modern supposition that municipal immunity was a fixture of American law from the beginning is common, but baseless. As Dean Green put it:

> "I was surprised to find this turn in legal doctrine, for I had assumed that immunity was recognized from the beginning . . . ."
>
> Green, "Freedom of Litigation (III): Municipal Liability for Torts," 38 *Ill. L. Rev.* 355, 359 (1944).

We do not contend that the pre-1871 law was clearly and universally in our favor on the issue of municipal liability. What we suggest is that the pre-1871 law on this issue was for the most part a hodge-podge of conflicting and unanalyzed *ipse dixits*. The non-governmental—governmental' quagmire" (*Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955)) had not yet, to mix a metaphor, attained the strangle-hold on the nineteenth century judicial imagination which it later achieved.[31]

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[31] An early New York dictum did elaborate such a distinction and carve out an area of municipal immunity in the performance of "Governmental functions." Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (1842). But the Bailey case was later repudiated on this point. See Darlington v. City of New York, 31 N.Y. 164, 200-01, 88 Am. Dec. 248, —— (1865).

This fact is not so surprising when it is noted that the distinction between private and public corporations, which is so basic to a lawyer's thought today, was still a slowly developing concept in the middle of the nineteenth century. Many lawyers still thought of all corporations as essentially public in nature. See Dodd, *American Business Corporations Until 1860*, pp. 14, 17 (1954). Thus it is not unreasonable to assume that, in the minds of many nineteenth century lawyers, public corporations and private corporations were deemed to be equally liable in tort. When the still important influence of Blackstone is recalled, this becomes even more plausible. Blackstone had completely muddled the distinction between public and private corporations:

> "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us: artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."
>
> 1 Blackstone, Commentaries, 113 (*124)(Cooley ed. 1899).

Thus, many western state judges had, at least seemingly, rejected immunity in sweeping terms which reveal no thought that cities were different from other corporations. Although most of the cases can be distinguished on their facts, the point remains that the reports abounded in sweeping declarations of liability which *seemed* to be all-inclusive.

For example, the Ohio Supreme Court, in 1831, had said:

> "Whatever may have been the ancient doctrines, with regard to the liability of corporations, for wrongs done by their agents, courts have gradually departed from them, and adopted principles more congenial to the state and condition of the world. Corporations

are established, in our country, for almost every concern of life—political, pecuniary, and eleemosynary. They govern towns, construct roads, engage in manufactures, trade in money, build churches, teach schools, and collect and distribute alms. In all these operations, they act by agents. Where benefits are derived, the corporation enjoys them. Where injury is inflicted through their means, they ought to be responsible for it . . . .

"If an individual is injured, it is right he should have redress, against all upon whose account the injury was perpetrated. There is no justice in sending him to seek redress from an irresponsible agent. There is no propriety in compelling the injured party to look for compensation to the mere agent . . .

"All corporations act by agencies, and those agencies are composed of men who may be influenced by reprehensible motives, or tempted to do acts not warranted by law. In this case, the act is charged in the declaration to have been illegal and malicious. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is the plain dictate of justice, and we see no technical rule of law that forbids us to act upon it."

Goodloe v. *City of Cincinnati*, 4 Ohio 500, 513-14, 22 Am. Dec. 764, 765-66, (1831).

During the 15 years preceding 1870, Illinois had repudiated the doctrine of immunity on three occasions. In 1855, the Illinois Court held that municipalities were liable for negligence. It did not discuss whether the negligence was "governmental" or otherwise. Instead, it stressed morality:

"We not only feel authorized but required to afford the protection sought. And more especially, as we think the decision based upon sound sense in accordance with strict morality, and keeping pace with the progress of the improvements of the age."

Browning v. *City of Springfield*, 17 Ill. 143, 148 (1855).

Five years later, the court reaffirmed its position, holding that trespass would lie against a municipal corporation:

> "Governmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents, for which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued."
>
> *Allen* v. *City of Decatur*, 23 Ill. 272, 275 (1860).

In *Nevins* v. *City of Peoria*, 41 Ill. 502 (1866), the Illinois Supreme Court again reaffirmed the rule of liability.[32]

Louisiana, prior to passage of the Civil Rights Acts, had specifically held municipalities liable for the wrongful acts of police officers. In *Johnson* v. *Municipality No. One*, 5 La. Ann. 100 (1850), the Louisiana Court affirmed a $600.00 damage judgment against a city for the illegal detention in its jail of the plaintiff's slave. The Court said:

> "The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned."
>
> 5 La. Ann. at 100.

Accord, *Baumgard* v. *Mayor*, 9 La. 119, 29 Am. Dec. 437 (1836). Also see the 32 early negligence cases imposing liability on municipalities cited in *Barnes* v. *District of Columbia*, 91 U.S. 540, 551 (1875), and the 20 such pre-1870 decisions listed in Green, "Freedom of Litigation (III): Municipal Liability for Torts," 38 *Ill. L. Rev.* 355, 358 n. 12 (1944).

On the other hand, it appears that in some of the early cases which were similar on their facts to the case at bar, the municipality had escaped liability. (If other pre-1871

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[32] It was not until 1870 that the Illinois law of municipal immunity began its evolution. See Molitor v. Kaneland Community School District, 18 Ill. 2d 11, 16 (1959).

decisions involving municipal liability for police lawlessness exist, we have been unable to find them.) See, *Stewart* v. *New Orleans*, 9 La. Ann. 461 (1854) (municipality not liable for beating a slave to death); *Dargan* v. *Mobile*, 31 Ala. 469 (1858) (municipality not liable for beating a slave to death); *Buttrick* v. *Lowell*, 1 Allen (83 Mass.) 172 (1861) (municipality not liable for beating and false arrest); *Elliott* v. *Philadelphia*, 7 Phil. 128 (1869) (negligence). But cf. *Clague* v. *New Orleans*, 13 La. Ann. 275 (1858) (municipality *is* liable for letting a slave escape from a chain gang). Contra. *Richmond* v. *Long's Adm'r*, 17 Gratt. (Va.) 375 (1867) (municipality *not* liable for letting a slave escape from a hospital).

Two facts must be noted in appraising the significance of these cases.

First: with but two exceptions, these cases were decided by slave state courts. Both *Stewart* and *Dargan* involved police brutality directed at slaves who were unlawfully assembled in groups of four or more, away from quarters. One clearly involved a curfew violation. The other probably did. It may be that the policy which led these Southern judges to immunize the cities involved, was a strong (but for obvious reasons unarticulated) desire that municipalities not be deterred from dealing with such serious offenses in any way they saw fit; this desire might well have stemmed from what was then an endemic and almost paranoid fear of a slave revolt.[33] Curfew violations and illegal assemblies were thus dealt with brutally and with dispatch, and this was thought

[33] *Cf.* Dollard, Caste and Class in a Southern Town 290 (Anchor Books, 3d ed. 1957); 14 Encyc. Soc. Sci., "Slavery," 84-85 (1934).

necessary and proper. Cf. *Dargan* v. *Mobile*, 31 Ala. 469, 477. But it is doubtful that such cases could have been influential with the abolitionist congresses which passed the post Civil War amendments to the Constitution, and the Civil Rights Acts. It would be ironic indeed if slave cases were to control construction of the Civil Rights Act in 1960.

Second: The basic theory of the Northern cases, seems to have been that the wilful acts of the policemen were not the acts of the city, because in committing them the officer did not represent the city—thus his act was not the city's act, and *respondeat superior* did not apply. See *II Dillon, Municipal Corporation*, §§ 772-73 (1st ed. 1872).[34] The focus of the cases seem to be *not* on immunity (the word is never used), but on *ultra vires* and scope of employment. At this point the philosophy of the cases collides head on with the philosophy of the fourteenth amendment and the civil rights legislation. There is no longer any doubt that when an officer of the state is engaged in his official duties, his act is the state's act for purposes of the fourteenth amendment and for purposes of the Civil Rights Act. *Screws* v. *United States*, 325 U.S. 91 (1945); *Williams* v. *United States*, 341 U.S. 97 (1951). Obsolete ultra vires or scope notions cannot control. If Congress had intended to incorporate such hair-splitting refinements in the law of agency as some of these old cases reveal, it chose a poor phrase when it outlawed actions committed

[34] The decisions not listed above, which are cited by Dillon in § 773 (police torts) of his treatise, are distinguishable on their facts from the case at bar. Thus, in Pesterfield v. Vickers; 3 Cold. (Tenn.) 205 (1866), the acts of an independently elected city marshal and a judicial officer were involved. The defendant mayor and aldermen thus had no direct control over the wrongdoers. Dillon himself distinguishes Atwater [*Sic.* "Altvater"] v. Baltimore, 31 Md. 462 (1869) (see II Dillon, § 773 n. 1) and also distinguishes the cases cited at § 773 n. 4.

"under *color of* any statute, ordinance, regulation, custom or usage . . . " R.S. § 1979.

> "Vague ideas of . . . *ultra vires* doctrine imported from private agency . . . do not nullify what four years of civil strife secured and eighty years have verified." *Screws* v. *United States*, 325 U.S. 91, 116 (1945) (concurring opinion).

We emphasize that the above discussion of pre-1871 law does not purport to be exhaustive. But it is, we submit, more than adequate to show that there was no clear-cut, universally accepted doctrine of municipal immunity in existence at the time Congress passed R.S. § 1979. This johnny-come-lately rule of injustice is *not* one of the "presuppositions of our political history." *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951).

D. STATE LAW RULES OF MUNICIPAL IMMUNITY SHOULD NOT BE PERMITTED TO CONTROL THE APPLICATION OF THE FEDERAL CIVIL RIGHTS ACT, BECAUSE FEDERALLY GUARANTEED CIVIL RIGHTS SHOULD BE PROTECTED EQUALLY AND UNIFORMLY IN EVERY STATE.

This Court has never said whether rules of state law may control the question of municipal liability under R.S. § 1979.

Petitioners contend that such questions should be decided as matters of federal law, so that the Act will mean the same thing in every state, as to matters of substantive liability. Respondents claim that the law of the state where the cause of action arose should control.

Holdings in two circuits seem to side with petitioners, although the precise point was not discussed. Both cases involved, *inter alia*, damage claims which were upheld.

Burt v. *City of New York*, 156 F. 2d 791 (2d Cir. 1946) (L. Hand, J.); *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir. 1945), cert. den. 326 U.S. 721 (1945).

Dicta in four circuits support respondents. *Cuiksa* v. *City of Mansfield*, 250 F. 2d 700, 703-04 (6th Cir. 1957); *Agnew* v. *City of Compton*, 239 F. 2d 226, 230 (9th Cir. 1956); *Cobb* v. *City of Malden*, 202 F. 2d 701, 703 (1st Cir. 1953); *Charleton* v. *City of Hialeah*, 188 F. 2d 421, 422-23 (5th Cir. 1951); *Hewitt* v. *City of Jacksonville*, 188 F. 2d 423 (5th Cir. 1951). In each of these five cases, it was asserted that the state law of municipal immunity was controlling.

The first dictum came in *Charlton*. The Fifth Circuit cited no federal authority, and disposed of the issue in two paragraphs which assumed the point to be decided. The subsequent cases merely cite *Charlton* and each other. Apparently, none of the arguments presented here was considered in any of these five "state law" cases.

The great purpose of the fourteenth amendment was to secure uniform protection of fundamental liberties throughout the country. If state law is to govern questions of liability under the fourteenth amendment's enforcing legislation, then protection of civil liberties will not be equal over the nation.

This Court has pointed out that "a comparative study of the cases in the forty-eight States" on municipal immunity "will disclose an irreconcilable conflict." "More than that," the Court continued, "the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co.* v. *United States*,

350 U.S. 61, 65 (1955). Here, as in *Indian Towing*, absorption of state law on municipal immunity will lead the federal courts straight into the "'non governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." 350 U.S. at 65.

New York has abolished municipal immunity for police torts. So has Florida. *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130 (1957). So, as of Dec. 16, 1959, has Illinois. Compare *Molitor* v. *Kaneland Community School District*, 18 Ill. 2d 11 (1959) with *Peters* v. *Bellinger*, 19 Ill. 2d 367 (1960). But many other states hold to the contrary.

If in adopting the Civil Rights Act, "Congress has declared the historic judgment that within this precious area . . . there is to be no slightest risk of nullification by state process," (Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 *Law & Contemp. Prob.* 216, 230 (1948)), it seems unreasonable for liability under the Act to depend upon the vagaries of state common or statutory law.

> "Federal law is no judicial chameleon, changing complexion to match that of each state . . ."
>
> *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447, 471-72 (1942),

Well established principles evolved by this Court in other areas of federal law strongly support petitioners' contentions here.

> "We must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the Federal Act dependent on state law. That assumption is based on the fact that the application of Federal legislation is nation-wide . . . and at times on the fact that the Federal program would be impaired if state law were to control . . . ."
>
> *Jerome* v. *United States*, 318 U.S. 101, 104 (1943).

This Court has thus made it clear that, while municipal immunity may be a good defense in a state law case, it is not available in federal courts when federally sanctioned rights are involved.

The leading case is *Workman* v. *New York City*, 179 U.S. 552 (1900). There plaintiff's vessel had been struck by a New York City fire boat. Plaintiff sought damages against the city. At every stage, the city pleaded sovereign immunity.

The Court of Appeals held, and this Court assumed, that under New York law as it then stood, the city was immune from damage liability in suits arising from its "governmental" activities. Both courts viewed the activity in question (operation of a municipal fire boat en route to a fire) as "governmental" under New York law. Thus, this Court described the opinion below as holding that:

> "The City, in the operation of the fire boat, performed a governmental, and not a corporate, function . . . [T]herefore, under the assumption that the [New York] decisions . . . were authoritatively controlling, [the Court of Appeals] held the City not liable."
>
> 179 U.S. at 557.

This Court reversed. After summarizing the opposing argument (179 U.S. at 557-58) it held that the City was liable. 179 U.S. at 574. The reasons are applicable here.

The *Workman* opinion observed that the law of sovereign immunity varied from state to state. If local doctrines of immunity were to be engrafted onto the federal law, said the Court, it would follow that:

> "Such law would be necessarily one thing in one state and one in another . . . would be one thing to-day and another thing to-morrow."
>
> 179 U.S. at 558.

The Court went on to point out:

> ". . . [I]f the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution."
>
> 179 U.S. at 558.

Not only would all "symmetry" and uniformity in the protection of federally sanctioned rights be destroyed, said the Court, but the federal law "which would survive would have imbedded in it a denial of justice." 179 U.S. at 559. This, continues the opinion,

> "must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor."
>
> 179 U.S. at 559.

The anomalies latent in the proposition that the local law of municipal immunity is part and parcel of the Civil Rights Act are strikingly illustrated by the construction of the Act in *Charlton* v. *City of Hialeah*, 188 F. 2d 421 (5th Cir. 1951) in the context of changing Florida and Illinois law.

At the time of *Charlton*, Florida law immunized cities from suits arising out of police torts. *City of Miami* v. *Bethel*, 65 So. 2d 34 (1953). Therefore, the *Charlton* court thought a Florida city immune under the Civil Rights Act. But in 1957, the Supreme Court of Florida overruled the *City of Miami* case, saying:

> "Affirmatively we hold that a municipal corporation may be held for the torts of police officers under the doctrine of *respondeat superior*."
>
> *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130, 133 (1957).

At the time the police invaded the Monroe home, Illinois law immunized cities from suits arising out of police torts. *Taylor* v. *City of Berwyn*, 372 Ill. 124 (1939). Therefore, under the Charlton rule, an Illinois city would be immune under the Civil Rights Act. But on Dec. 16, 1959, the Supreme Court of Illinois overruled the immunity doctrine, giving its decision "prospective only" operation. *Molitor* v. *Kaneland Community School District*, 18 Ill. 2d 11.

Thus, if the "state law" contention of respondents here is accepted, and the reasoning of *Workman* ignored, the following conclusions must necessarily be true:

1. The City of Hialeah was not a "person" subject to suit in 1951, but is one now.
2. The City of Chicago was not a "person" subject to suit at the time of the Monroe search, but is one now.
3. At the time of the Monroe search, the City of Hialeah was a "person" subject to suit, but the City of Chicago was not.
4. Today, both Chicago and Hialeah are "persons" subject to suit, but cities in many other states are not.

All of these results would seemingly flow from the proposition that state law should control the operation of the federal act. This is just the sort of inconsistency which the Court foresaw in *Workman*. We therefore suggest that the *Workman* rule should be applied here.

The rule in *Workman* is over 50 years old. It has stood the test of time.[35] See e.g., *United States* v. *Port of Port-*

[35] Ex Parte New York, No. 1, 256 U.S. 490 (1921) and Ex Parte New York, No. 2, 256 U.S. 503 (1921) are distinguishable. No. 1 is an eleventh amendment case; probably No. 2 is also. And No. 2 involved an attempt to *attach* "property and revenue necessary for the exercise" of governmental functions by a *state*. 256 U.S. at 511.

land, 300 Fed. 724, 726 (9th Cir. 1924); *City of Chicago* v. *White Transp. Co.*, 243 Fed. 358 (7th Cir. 1917); *In Re Nueces County, Texas*, 174 F. Supp. 846, 850 (S.D. Tex. 1959); *Steel All Welded Boat Co.* v. *City of Boston*, 18 F. Supp. 421 (D. Mass. 1937).

The *Workman* principle has been extended to many other areas of Federal law. See e.g., *Frame* v. *City of New York*, 34 F. Supp. 194 (S.D.N.Y. 194 (Jones Act); *United States* v. *City of New York*, 82 F. 2d 242 (2d Cir. 1936) (Damage action under Federal Tax Lien Act).

For these reasons, petitioners suggest that it would be unsound for this Court to engraft upon the Federal Civil Rights Act the fluctuating and inconsistent standards of state law which, as this Court has pointed out, in many cases work "a denial of justice." *Workman* v. *New York City*, 179 U.S. 552, 559 (1900).

E. THE FEDERAL COURTS WILL NOT BE SERIOUSLY INCONVENIENCED BY SUITS TO REDRESS VIOLATIONS OF CONSTITUTIONAL RIGHTS, IF CITIES ARE HELD LIABLE.

It is thought that one of the unarticulated reasons for rejection of jurisdiction by the courts below was the fear that acceptance of jurisdiction would result in the federal courts being inconvenienced by large numbers of cases of this type.

This fear is not sustained by experience.

Only 36 suits under the Civil Rights Act against police officers have been reported in the Federal Reports since *Hague* v. *CIO*, 307 U.S. 496 (1939), was decided by this Court. (See our Petition for Certiorari, pp. 34-35).

Chronologically, the reported decisions are distributed as follows (including duplications where the case was reported more than once):

1939—1	1950—5
1940—0	1951—2
1941—0	1952—3
1942—0	1953—3
1943—0	1954—2
1944—1	1955—5
1945—1	1956—2
1946—0	1957—3
1947—2	1958—6
1948—1	1959—5
1949—3	

Picking v. *Pennsylvania R. Co.*, 151 F. 2d 240 (3rd Cir. 1945), a very broad case from whose liberal doctrines the lower federal courts have been beating a consistent retreat, did not result in a flood of cases. There are only four reported cases in the Third Circuit (see Petition for Certiorari, 38), all for damages, and in every one of which the complaint has been sustained.

There have been only eight reported cases in the Fifth Circuit since 1952 (Petition for Certiorari, 39-40), and only seven in the Seventh Circuit since 1953. (Petition for Certiorari, 41-42). There have never been any cases reported in the First, Tenth, or District of Columbia Circuits. (Petition for Certiorari 37, 43).

We are unable, of course, to say what numbers of cases are pending *nisi prius* in the district courts. It is our impression that in the district court in Chicago, the number filed since 1939, and the number pending now, are relatively insignificant.

An index to the possible increase in case load resulting from acceptance of these cases by the federal courts may be the volume of cases filed in the state courts for police torts arising out of false arrest and imprisonment and malicious prosecution.

Although the law is perfectly clear that every arrest and imprisonment is presumptively tortious and must be affirmatively justified, only a very small number of cases seem to be filed. A negligible number come to the state courts of review. In the past ten years, only five such cases are reported from the Illinois Appellate Court, and only one from the Illinois Supreme Court.[36]

An attempt to determine the incidence of such suits was made by sending letters of inquiry to 54 of the largest cities of the United States. Some 19 responses have been received up to the date of printing this brief. A table of the cities queried and their reports as to the number of suits filed within the past twelve months follows. (The letters of response are being lodged with the Clerk of this Court, and copies have been, and from time to time as new letters come in will be, supplied to respondents' counsel).

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[36] Fulford v. O'Connor, 3 Ill. 2d 490 (1954), Shemaitis v. Froemke, 12 Ill. App. 2d 231 (1956); Watkins v. Sullivan, 11 Ill. App. 2d 134 (1956); Sparacino v. Ferona, 1 Ill. App. 2d 227 (1954); Aldridge v. Fox, 348 Ill. App. 96 (1952); Raucci v. Connelly, 340 Ill. App. 280 (1950).

City	*Suits Filed Within Past Twelve Months*
Atlanta, Ga.	No response.
Baltimore, Md.	" "
Birmingham, Ala.	" "
Boston, Mass.	" "
Buffalo, N.Y.	" "
Charleston, S.C.	" "
Charlotte, N.C.	1 suit within ". . . past several years."
Cincinnati, Ohio	1 suit in 1959.
Cleveland, Ohio	No response.
Columbus, Ohio	2 suits. (". . . average . . . .")
Dallas, Texas	No response.
Denver, Colo.	2 suits. (". . . this type of situation is not a problem.")
Des Moines, Ia.	No response.
Hartford, Conn.	"Seven suits presently pending."
Honolulu, Ha.	No response.
Houston, Texas	" "
Indianapolis, Ind.	" "
Jackson, Miss.	" "
Jacksonville, Fla.	" "
Jersey City, N.J.	" "
Kansas City, Mo.	"No suits filed."
Los Angeles, Cal.	No response.
Memphis, Tenn.	" "
Miami, Fla.	" "
Milwaukee, Wisconsin	9 cases 58-59 fiscal year. 9 cases 59-60 fiscal year.
Minneapolis, Minn.	No response.
Mobile, Ala.	" "
Montgomery, Ala.	" "
New Bedford, Mass.	" "
New Orleans, La.	" "
New York, N.Y.	" "
Newark, N.J.	" "
Oklahoma City, Okla.	1 suit.

Omaha, Neb.	1 suit (". . . very few . . . .")
Philadelphia, Pa.	No response.
Phoenix, Ariz.	No response.
Pittsburgh, Pa.	No response.
Portland, Maine	"No cases in 15 years."
Portland, Oregon	No response.
Providence, R.I.	" "
Reno, Nev.	"No cases."
Richmond, Va.	No response.
Rochester, N.Y.	9 suits.
St. Louis, Mo.	No response.
St. Paul, Minn.	"No suits."
Sacramento, Cal.	No response.
Salt Lake City, Utah	"No suits."
San Francisco, Calif.	No response.
Seattle, Wash.	"
Spokane, Wash.	"2 cases in 10 years."
Syracuse, N.Y.	No response.
Tulsa, Okla.	"No suits."
Washington, D.C.	"3 suits," no change in volume.
Wichita, Kan.	"No suits."

Thus even in Chicago "which probably has the worst [police] department of any sizeable city" (Life Magazine, Sept. 16, 1957, p. 71), only 31 suits were filed in 1959, although the Police Department made "two hundred seven thousand physical arrests . . . ." in 1959. See 1959 Annual Report, City of Chicago, Department of Law 29 (a copy of this report has been lodged with the Clerk). We are informed that under the administration of Professor O. W. Wilson, Chicago's new police superintendent, the rate of filing such suits has shown a marked drop.

There are eight federal district judges in the Northern District of Illinois. Thus, even for 1959, the load would have averaged less than four cases to a judge, assuming that all the cases had been filed in federal court as civil rights cases.

Since illegal searches and seizures and police brutality do not arise out of negligence, but are peculiarly a reflection of the policies and attitudes in the top echelons of a police department, it is inevitable that holding the municipality and the misfeasant officers to vigorous account will result in a change in such policies and attitudes.[37] The intransigence of the English courts in the Cases of the General Warrants put an abrupt and permanent stop to illegal searches and seizures in Britain. "The cause of public liberty had been vindicated, and was henceforth secure." 2 May, *Constitutional History of England*: 1760-1860 252 (1874).

It also seems clear that this Court's refusal to immunize cities from liability under R. S. § 1979 would not result in imposing any substantial financial hardship upon American municipalities. A recently published article in the Northwestern University Law Review is instructive on this question:

> "The fear is often expressed that the complete abolition of sovereign immunity will result in bankrupt municipalities. Such a fear, however, is not borne out by statistics. In 1958 the city of Chicago disposed of 890 personal injury cases with a total expenditure of 1.6 million dollars. This represents a per capita expenditure of approximately 40 cents per year. An overwhelming number of cases against the city are settled before the trial stage. The efficiency of the legal staff in seeking out inflated claims is evidenced by the fact that damages actually recovered amounted to only 8.5% of the total sought. Street and sidewalk claims, which constitute the majority of claims against municipalities, accounted for slightly over one million dollars or about 20 cents per capita. In the same year, street and sidewalk claims against the city of Los Angeles amounted to only 10 cents per capita. Evans-

[37] Compare the letter dated August 15, 1960, from the Law Department of Oklahoma City, which has been lodged with the Clerk.

ton, Illinois is a considerably smaller city, having a population of about 75,000. However, in the years 1954-1958 the average yearly expenditure for tort claims was $12,162 representing a per capita expense of only 16 cents per year. Employing a one man legal staff, this city was able to reduce payments to only 9% of the total sought. A New York survey indicates that damages are generally greater for smaller towns, but even for the smallest class villages in the year 1953 total damages for all torts averaged only 22 cents per capita. Absent a disaster brought about by the negligence of the municipality it would appear that even the smallest towns need not fear tort judgments, and limited liability for the smaller towns could protect against even this occurrence. The abolition of the partial immunity of the municipality would seem to work no great depletion of public funds."

Comment, "Governmental Immunity in Illinois: The Molitor Decision and the Legislative Reaction," 54 *Nw. U. L. Rev.* 588, 602-03 (1959).

The 1959 Annual Report of the City of Chicago's Law Department, which petitioners have lodged with the Clerk, reveals, at pages 44-45, that the situation has not materially changed since the Northwestern article appeared. Last year the Torts Division of the City Law Department disposed of 899 cases. The cost to the City averaged $1,657.00 per case.

It is worth noting that in the same Report, the Law Department acknowledges the City's already vital role in police litigation, stating (p. 44) that ". . . to insure adequate counsel to the police officer and to keep the City's financial burden at a minimum, the City, through the Torts Division, accepts the defense of these matters."

CONCLUSION.

"We are told about crime and the need for law enforcement. We often think more in terms of detection and

punishment than in the means employed. There is no organized group, no articulate minority that keeps alive the need for protecting the accused. People whose homes are searched are the lowly, not the high. It is the unknown person who is tortured by the police. The prominent and the powerful people among us do not suffer the main invasions of privacy that take place. As Justice Black said in *Chambers* v. *Florida* (309 U.S. 227, 238), "• • • • they who have suffered most from secret and dictatorial proceedings have almost always been the poor the ignorant, the numerically weak, the friendless, and the powerless." If they are to be protected, the public opinion of the community, as well as the courts, must be enlightened.

"The means are all-important in a civilized society. It may seem unimportant that a miserable person is forced to confess to a crime. But in the sweep of history, a nation that accepts that practice as normal, . . . a people that exalts the ends over the means have no claim to a position of moral leadership among the nations."

Justice Douglas, *The Right of the People* 157 (1958).

The Monroe family may be in humble circumstances, but they know their rights, and we believe they are not powerless to defend them so long as this Court sits.

For the foregoing reasons, the judgment below should be reversed and the cause remanded with instructions that respondents be ordered to answer the complaint.

Respectfully submitted,

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APPENDIX A

MEMORANDUM ON THE HISTORIC SIGNIFICANCE OF THE INDIVIDUAL'S RIGHT TO PRIVACY IN HIS HOME, FREE FROM UNREASONABLE SEARCHES, WITH PARTICULAR ATTENTION TO:

(1) THE CASE OF THE WRITS OF ASSISTANCE

(2) THE CASES OF THE GENERAL WARRANTS

(3) THE CONGRESSIONAL DEBATES ON R. S. § 1979.

Long before *Wolf* v. *Colorado*, 338 U.S. 25 (1949) and *Elkins* v. *United States*, 364 U.S. (Adv.) ...., 80 S. Ct. 1437 (1960), the Founding Fathers knew that when police unreasonably invaded private homes without a special warrant from a judge, they committed no ordinary offense.[1]

The tactics of George III's customs officers in searching homes and other places under color of general warrants knowns as "writs of assistance" early stimulated the American colonists to eloquent protest.

Future Chief Justice John Marshall, writing in the early days of the republic, said:

> "The right to grant special warrants was never contested, but this grant of a general warrant was deemed contrary to the principles of liberty, and was thought an engine of oppression, equally useless and vexatious,

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[1] Modern Americas are no less aware:

> "Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism."

Statement by J. Edgar Hoover, quoted in Irvine v. California, 347 U.S. 128, 150 (1954) (dissenting opinion of Frankfurter, J.).

Cf., J. Edgar Hoover, "The Federal Bureau of Investigation: The Protector of Civil Liberties," 46 A.B.A.J. 835, 836, 838 (1960).

which would enable every petty officer of the customs to gratify his resentments by harassing the most respectable men in the province."

Marshall, *American Colonies*, 377, Quoted, Quincy's Mass. Rep. 435.

In 1772, a committee of twenty-one Bostonians, headed by Samuel Adams, James Otis and Joseph Warren, having been designated at a public meeting at Faneuil Hall to draft a statement of "The Rights of the Colonists . . . as Men, as Christians, and as Subjects . . . ." reported on general searches by customs men, as follows:

"These Officers are by their Commissions invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy . . . . Each of these petty officers . . . is intrusted with Power more absolute and arbitrary than ought to be lodged in the hands of any man or Body of Men whatsoever; for [they are given] . . . 'full Power . . . in the day-time to go into any House, Shop, Cellar, or any other place, where any Goods, Wares or Merchandise lie concealed, or are *suspected* to lie concealed, whereof the customs . . . have not been . . . duly paid . . . and the said House . . . to search and survey . . . .'

"Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks, and Chests broke open, ravaged and plundered, by Wretches . . . whenever they are pleased to say they *suspect* there are in the House, Wares, etc. for which the Duties have not been paid . . . . By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These officers may *under color of Law* and the cloak of a general warrant, break through the sacred Rights of the Domicil . . . ."

Quoted, Quincy's Mass. Rep., pp. 466-67 (Emphasis in original, except for phrase, "color of Law.")

Even Hutchinson, the Tory Chief Justice of the King's Superior Court of Massachusetts, who in 1761 had denied Otis' plea to outlaw writs of assistance, was impelled to the wry observation that somehow the "illicit traders" of Boston had put "a notion . . . into the heads of the common people in general that these writs were contrary to their liberties as Englishmen." Letter to The Earl of Kinnoul, Oct. 27, 1765, quoted in Quincy's Mass. Rep. 415.

John Adams repeatedly said that American Independence was born the day in 1761 that Otis denounced the writs of assistance before the Superior Court. See 10 Adams' Works 247-48, 276. The Otis speech is well known to this Court (see, *e.g.*, *Frank* v. *Maryland*, 359 U.S. 360, 364, 378-80 (1959)) but, in the face of the continuing insistence by respondents that nothing *constitutional* is wrong with the police activity here involved, it bears quotation once more:

> "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."
>
> Tudor, *Life of James Otis*, p. 66 (cited "Tudor" hereafter.)

The writs authorizing general searches of private property were, said Otis:

> "The worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principle of law that ever was found in an English law book, since they placed the liberty of every man in the hands of every petty officer."
>
> *Tudor*, p. 66.

Otis thought Magna Charta secured the fundamental right of the citizen to be free from the dread of police entering his home without special warrant, basing their entry on "bare suspicion without oath." *Tudor*, p. 67. Otis argued that an act purporting to authorize writs of assist-

ance was therefore void, quoting Lord Coke's dictum in *Dr. Bonham's Case*, 8 Co. 114a, Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610), that "An act against the constitution is void." See Quincy's Mass. Rep. pp. 56, 474.[2]

This same idea was shared by at least some of the Congressmen who enacted R. S. §1979. The line from Coke to Otis to the case at bar runs true. Representative Hoar of Massachusetts, speaking in support of the law here invoked by petitioners, said in the House on March 29, 1871:

> "There came into my possession in my youth a copy of Lord Coke's Second Institute, which had belonged to James Otis, and which contained his autograph. On examining it I found certain passages underscored. For the purpose of his great argument in the case of the writs of assistance, where he dealt with all the fundamental questions of government and civil liberty, that great Isaiah of the Revolution had marked in this book, which he held in his hand when he made the argument, one passage among others.
>
> "It is the passage where Lord Coke asserts that Magna Charta is not a new grant of right, but the declaration of the old fundamental common law privileges of Englishmen. Magna Charta enumerates especially the rights, all now involved at the South, of life, personal security and private property."
>
> *Globe* 322.[2a]

Contemporaneously with the American agitation against writs of assistance, the elder Pitt, in terms which have been

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[2] *Cf.*, 4 Coke, Institutes, pp. 176-77:

> "For justices of the peace to make warrants upon surmise, for breaking the houses of any subjects to search for felons or stolen goods is against Magna Charta."

[2a] Rep. Hoar's claim to ownership of Otis's copy of the *Institutes*, and his description of the markings in Otis's handwriting are independently verified by the note of Samuel Quincy, who, in 1864, published his grandfather's *Reports*. See Quincy's Mass. Rep., p. 484.

noted in this Court's opinions,[3] affirmed the Englishman's right to privacy in his home:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter;—but the King of England cannot enter; all his force does not cross the threshold of the ruined tenement."
>
> William Pitt, Earl of Chatham, quoted in 1 Cooley, *Constitutional Limitations* 611 (8th ed. 1927).

Again, it is not surprising to hear distinct echoes of Pitt as well as Otis in the utterance of those who enacted R. S. §1979:

> "Let justice for all, by the power and majesty of American law be established for all, so that the poorest man in his hovel on the frontiers of your widely extended domain, bearing with him toward the setting sun the symbols of civilization, and laying in the wilderness the foundations of new commonwealths, may be made as secure in his person and property as the prince in his palace or the king on his throne."
>
> Rep. Bingham, Ohio, *Globe*, Appendix 86, col. 2 (March 31, 1871).

The framers of R. S. §1979 did not confine themselves to impassioned generalities. They descended to particulars:

> "Governor Senter [of Tennessee], in his message, as we have seen, did not hesitate to charge that the men who by their official position were clothed with power to prevent and repress these troubles were in complicity with the organized, armed, and disguised authors of them.
>
> "Why, sir, it was but the other day that I was alluding to it—it may have been two weeks ago, I think it

[3] Frank v. Maryland, 359 U.S. 360, 378-79 (1959); Miller v. United States, 357 U.S. 301, 307 (1958).

> was hardly so long—a band of disguised men in the county of Rutherford, in which county is the city of Murfreesborough, went at night to the house of Wiley Kimbro, an old colored man, who was there with his family and perhaps a kinsman, and attempted to break and enter his domicile by force. While they were endeavoring to do that, the owner, under these circumstances of menace and terror, from his humble 'castle of defense' fired and killed one of the party and drove off the rest. *The man killed was found to be the constable of the district, and one of the others was the sheriff of the county.*"
>
> Rep. Maynard, Tennessee, *Globe*, Appendix 309 (March 30, 1871) (Emphasis supplied).

(The same incident was again described and stressed by Rep. Butler of Massachusetts on April 4, 1871. *Globe* 445. It was again alluded to by Rep. Stevenson of Ohio. *Globe*, Appendix 299, col. 2 (April 4, 1871).)[4]

Minutes after Maynard described this incident, Rep. Garfield interrupted to ask "what are the 'rights, privileges, or immunities' alluded to" in the pending bill.[5] Congressman Maynard responded:

> "I suppose it embraces all privileges and immunities secured by the Constitution; for example, . . . any of the personal rights which the Constitution guarantees to the citizen—freedom of speech, of the press; in religion, *in house, papers, and effects;* from arrest

[4] See also the denunciation of the brutal misconduct of a group of Norfolk policemen by Rep. Platt of Virginia, at Globe, Appendix 184-85 (April 4, 1871). Rep. Whitthorne, of Tennessee, an opponent of the Act, assumed that it would be applicable to police officers and attempted to satirize the result. See *Globe*, 337 (March 29, 1871).

[5] Congressman Garfield was inquiring specifically about Section 2 of the pending bill. R.S. § 1979 was found at Section 1. But the phrase "rights, privileges and immunities secured by the Constitution . . . ." was identical in each section, and Maynard's answer was clearly applicable to both sections.

without warrant, from being twice put in jeopardy for the same offense; indeed, every personal right enumerated in the Constitution . . . ."

Globe, Appendix 310, col. 2 (Emphasis supplied).

Congressman John A. Bingham, famous as "the Madison of the first section of the Fourteenth Amendment," *Adamson* v. *California*, 332 U.S. 46, 74 (1947), on the day following Maynard's speech, reiterated Maynard's point:

"Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, . . . are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows:

". . . . [Quoting Amendments One through Three.]

"4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

". . . . [Quoting Amendments Five through Eight.]"

Globe, Appendix p. 84.

In the same vein, Rep. Dawes of Massachusetts listed the rights to be protected by the bill. However, Dawes read the actual text of *but one* of the first eight amendments. He said:

". . . and still further, sir, his house, his papers, and his effects were protected against unreasonable seizure. Let me read, Mr. Speaker, this article in full:

" 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .'

". . . .

"It is to protect and secure . . . [the citizen] in these rights, privileges and immunities this bill is before the House . . . ."

Globe, 475, 476 (April 4, 1871).

Rep. Roberts of New York agreed:

"Nothing can so weaken the life of a Government as even to seem to neglect its citizens. No higher duty can exist than to protect them. Be they white or black, they must have free speech, a free ballot, *and a safe home*."

Globe, 414, col. 1 (April 3, 1871) (Emphasis supplied).

Lest petitioners' position be misunderstood, we emphasize that *it is not here contended that every provision of the first eight amendments is made applicable to State action by the fourteenth amendment's privileges and immunities clause or its due process clause*. But the above quotations *do* negate the possibility that Congress was oblivious to the search and seizure implications of its legislation conferring a federal cause of action for damages upon persons whose "rights, privileges, or immunities secured by the Constitution" might be violated by state officers. This fact powerfully reinforces the view already expressed by a majority of this court in *Elkins* v. *United States*, 364 U.S. (Adv.) ..., 80 S. Ct. 1437 (1960) that the unreasonable searches and seizures forbidden by the fourth amendment are likewise forbidden by the fourteenth.

Certainly, there is nothing novel about a private citizen suing for damages after having been victimized by an unreasonable search of his home by policemen. This Court, in *Wolf* v. *Colorado*, 338 U.S. 25, 30-31 (1949), explicitly held that "private action" was an appropriate remedy. "Private action" for damages is peculiarly fitting, because it not only serves to deter the lawless officer and to compensate his victim, but it also avoids the dilemma

posed by the technique of suppressing evidence in criminal trials: that "the criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585 (1926), quoted by this court in *Elkins* v. *United States*, 364 U.S. (Adv.) ....., ..., 80 S. Ct. 1437, 1444 (1960).

It is noteworthy that the earliest judicial pronouncements on the legitimacy of unreasonable searches and seizures came in cases where money damages were sought. John Wilkes, in 1763, recovered £1,000 for the search of his home and the seizure of his papers by King's messengers acting under a general warrant; Lord Chief Justice Pratt commented to the jury that the power to issue general warrants was "totally subversive of the libery of the subject," and "contrary to the fundamental principles of the constitution." *Wilkes* v. *Wood*, 19 How. St. Tr., col. 1153, 1167 (C.P. 1763).

Also in 1763, one Huckle, a journeyman printer, recovered £300 in a similar action. Huckle had been seized under a general warrant, and held without charge for six hours by the King's messenger Money, who "used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damage." *Huckle* v. *Money*, 2 Wils. 205 (C.P. 1763). On motion for a new trial "for the excessiveness of the damages," Lord Chief Justice Pratt upheld the verdict on the apparent ground that the award, although very large, was justified because of the grave nature of the offense:

> "[T]he jury] saw a magistrate over all the King's subjects, exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them.

"* * * *

"To enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the *Spanish* inquisition, a law under which no *Englishman* would wish to live an hour: it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of *Magna Charta* . . . which is pointed against arbitrary power, was violated."

2 Wils. at 207 (Emphasis in original).

Finally, two years later, Lord Mansfield and three other judges affirmed judgment on a jury verdict of £300 in favor of yet another victim of an unreasonable search and seizure. *Entick* v. *Carrington*, 19 How. St. Tr. Col. 1029 (C.P. 1765). *Entick*, "regarded as one of the permanent monuments of the British Constitution," *Boyd* v. *United States*, 116 U.S. 616, 626 (1886), resulted in a definite change in Parliament's policy and the ultimate abandonment of the general warrant. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 48-50 (1937).

Thus, petitioners' present claim reaches this court with impressive historical credentials. It comes with compelling support in the legislative history of R.S. §1979. And it is clearly confirmed by recent utterances of this court.

APPENDIX B.

MEMORANDUM ON THE LEGISLATIVE HISTORY OF § 1979, AS IT RELATES TO THE REASONS FOR FEDERAL JURISDICTION AND THE ACT'S INTENDED SCOPE.

Implicit in many of the lower court decisions construing the Civil Rights Acts seems to be a feeling that Congress was exclusively concerned with protection of Negroes in the South from discrimination. Also in some of these cases there is expressed an attitude that federal remedies are not important, because state remedies are available.

Petitioners suggest that the legislative history of R.S. § 1979 contains ample evidence that Congress intended its Act to protect individuals in every state of the Union, and that it intended that the Act should protect all races and classes of men in their constitutional rights.

Petitioners also suggest that the legislative history contains ample evidence that Congress, in conferring exclusive federal jurisdiction for actions under R.S. § 1979, acted upon the basis of articulated policy considerations which are still relevant today.

1. CONGRESS INTENDED THAT R.S. § 1979 SHOULD HAVE NATION-WIDE APPLICATION AND THAT IT SHOULD PROTECT ALL AMERICANS.

"There is something involved here transcending party issues and party schemes, and calling upon us for the calmest and coolest deliberation and the broadest and ablest statesmanship. The proposed legislation is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property rights, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes,

will be benefitted alike, because we are simply contending for good government and righteous laws.

"• • •

"And what has [President Grant] asked at our hand? For legislation under the Constitution to enable him to make the protecting shield of American citizenship as powerful to the humblest citizen, of whatever race or color, in Texas as in New England; to secure to the weakest citizen of the Carolinas the same political and civil rights enjoyed by the most favored citizen of the Republic."

Rep. Buckley, Alabama, *Globe*, Appendix 199, 196 (April 3, 1871).

"I want the law to apply in Nevada as well as in North Carolina.

"• • • •

". . . The honorable Senator from Missouri hands up an account of an outrage in my own State. For it I blush, and I have no apology to make for it; it was a wrong, and I want the law to apply there as well as in the State (of North Carolina) . . . . I would give protection to the humblest citizen in the most distant part of Missouri . . . . I would give it to North Carolina; I would give it from the East to the West, and cover the whole area of this country . . . ."

Sen. Nye, Nevada, *Globe* 657, 659 (April 13, 1871).

"The question now, is, whether it is competent for the Congress . . . to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guarantied to him by the Constitution."

Rep. Bingham, Ohio, *Globe*, Appendix 81 (March 31, 1871).

"The bill before us . . . is general, applicable to every State of the Union, or all of them together . . . ."

Rep. Archer, Maryland, *Globe* 373, col. 1 (March 31, 1871) (Opposing the bill).

"This . . . is a synopsis of the evidence . . . . It is evidence wholly in reference to North Carolina . . . . But now we are called on to consider a bill, not for the suppression of disorders in North Carolina, but to reach every State in the Union . . . ."

Rep. McCormick, Missouri, *Globe*, Appendix 137, col 3 (March 31, 1871) (Opposing the bill).

"It has been asserted that protection for the colored people only has been demanded; and in this there is a certain degree of truth, because they are noted for their steadfastness to the Union and the cause of liberty . . . . But, on the other hand, this protection is equally desired for those loyal whites, some to the manner born, others who, in the exercise of their natural rights as American citizens, have seen fit to remove thither from other sections of the States, and are now undergoing persecution simply on account of their activity in carrying out Union principles and loyal sentiments in the South."

Rep. Rainey, South Carolina, *Globe*, 394, col. 3 (April 1, 1871).

"The rights, privileges, and immunities which the Constitution confers upon the citizen, or guaranties to him, no State, no community, no individual should be permitted to take way, abridge, or render insecure. The Constitution should cover the nation as a shield and encompass its citizens like a fortress. It should be supreme, omnipotent, and omnipresent in all the States and Territories of the Union, and if one individual in Ohio, in Georgia, or elsewhere on United States soil, cannot, by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges, obtain the rights and privileges due an American citizen, and thereupon appeals to Congress for help, it is its duty to listen to that appeal."

Rep. Beatty, Ohio, *Globe*, 429, col. 2 (April 3, 1871).

"This law is asked for the protection of every class of citizens. We demand it not simply for the black

man, but for the Union men of the South, and even for the ex-rebels who would now yield obedience to the Government." '

Rep. Dunnell, Minnesota, *Globe*, Appendix 262, col. 5 (April 4, 1871) (This speech was not delivered on the floor of the House. It was merely inserted in the *Globe* by unanimous consent.)

"This section [now R.S. §1979] of this bill, . . . not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people . . . ."

Rep. Shellabarger, Ohio, *Globe*, Appendix 68, col. 1 (March 28, 1871). (Sponsor of the bill).

2. CONGRESS BASED ITS DECISION TO CONFER FEDERAL JURISDICTION FOR ACTIONS UNDER R.S. §1979 ON GROUNDS THAT ARE STILL RELEVANT TODAY.

Federal judges are appointed for life, on good behavior. Const. Art. III, §1. Most state judges are elected for varying terms. Many people feel that, for this reason, federal judges are more independent that state judges. Many people feel that, for this reason, the unpopular cause or litigant is likely to receive a fairer trial in federal court than in a state court. The Congress that enacted R.S. §1979 thought so.

During the course of the House debate on R.S. §1979, the following testimony given by a North Carolina judge was read into the record:

"Question: Can you suggest any remedy which, in your own belief as a judicial officer, would arrest these outrages?

"Answer. I declare I do not know what to suggest. A remedy might be enforced in the Federal courts perhaps. The judges in whose districts these outrages are alleged to be committed say they cannot do it in

the State courts, for the reason that they who vote occupy the jury-box .... Something must be done ..."

Globe, Appendix 137, col. 3 (March 31, 1871) (Speech of Rep. McCormick, Missouri).

Other congressmen echoed this sentiment, in varying terms:

"Local prejudices may become so strong and violent that they may overturn that sense of justice which we fondly hope, however, may ever dominate in the bosoms of all our rulers. We well understand the influence of popular sentiment, under elective governments, upon those who depend upon popular will for place and power. Governors, *judges*, and juries give way to a mania which sometimes seizes hold of the popular mind. Prejudices and passions, which make men forget their duties are more likely to be local than national. It is better, therefore, to have a Government less local and more general, and which is responsible to a whole nation and not alone to a small portion. Such a Government is more likely to be impartial, and to remain uninfluenced by prejudices and passions.

Rep. Sheldon, Louisiana, *Globe* 368, cols. 1-2 (March 31, 1871) (Emphasis supplied).

"The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"

Rep. Rainey, South Carolina, *Globe* 394, col. 3 (April 1, 1871).

"The reason the loyal people of Virginia are now free from Klu Klux violence, is because the judiciary, the Executive, and the Legislature are in the hands

of the Democratic party. The outrages committed upon loyal men there are under the forms of law. It can be summed up in one word: loyal men cannot obtain justice in the courts, or from the Legislature or the Executive of Virginia. And the same is true of Kentucky."

Rep. Porter, Virginia, *Globe, Appendix* 277, col. 1 (April 4, 1871).

"Some have here contended that our protection must come from the State in which we chance to reside. The old hateful doctrine of State rights is here urged, and we are told that the Federal Government has nothing to do in behalf of the citizen unless, indeed, the State authorities call for aid. These narrow views are repugnant to me. Our national life is involved in crises such as this. Shall not a power co-extensive with this life be invoked? Do we not instinctively turn to the Government for protection?

Rep. Dannell, Minnesota, *Globe, Appendix* 262, col. 2 (April 4, 1871) (This speech was not delivered on the floor of the House, but was inserted in the *Globe* by unanimous consent.)

". . . It has been a well recognized, I might say an undenied fact, that no Republican, white or black, especially if he is a citizen who has come here from another State or is at all prominent, can secure as plaintiff or defendant anything like equal justice before the courts of the State . . . ."

Rep. Platt, Virginia, *Globe Appendix* 185, col. 2 (April 4, 1871).

"To say in our Constitution . . . that State laws shall not be made or enforced to abridge these rights . . . nor the States deny protection of these rights . . . and then to say that Congress can do no such thing as . . . open the United States courts to enforce any such laws, but must leave all the protection and law-

making to the very States which are denying the protection, is plainly and grossly absurd."

Rep. Shellabarger, *Globe*, Appendix 68, col. 2 (March 28, 1871) (Sponsor of the bill).

The well known statement of Rep. Dawes of Massachusetts, in the House debate on April 4, 1871, which was quoted in part by Justice Douglas in the dissenting opinion in *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 180-181 (1959), summarizes the attitude of Congress:

"The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.

"* * * *

"I conclude, then, Mr. Speaker, by saying that in my opinion Congress has power to legislate for the protection of every American citizen, in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done—

"*First.* By giving him a civil remedy in the United States courts for any damage sustained in that regard."

Rep. Dawes, Mass., *Globe* 476, 477 (April 5, 1871).

APPENDIX C.

Constitutional Provisions of 60 Nations Pertaining to Search, Seizure, and the Inviolability of the Home.

The following provisions are found in Dodd, Modern Constitutions (1908), *Vol. I*:

Constitution of Brazil (1891):

"Art. 72, Sec. 11. The house is the inviolable asylum of the person who inhabits it; without his consent no one shall enter it at night, except to aid the victims of a crime or disaster, or during the day, except in the cases and in the manner prescribed by law."

Constitution of Chile (1833):

"Art. 137. The house of every person residing in Chilean territory shall be an inviolable asylum, and may not be entered except for special cause determined by law, and by virtue of an order of the proper authority."

"Art. 138. Epistolary correspondence shall be inviolable. No papers or effects shall be opened, intercepted, or searched except in the cases provided by law."

Constitution of Denmark (1866):

"Art. 81. The domicile is inviolable. The search of a house, the seizure and examination of letters and other papers shall take place only by virtue of a legal warrant, unless a special exception be authorized by law."

The following constitutional provisions are found in Dodd, op. cit. *Vol. II*:

Constitution of Italy (1848):

"A. 27. The domicile is inviolable. No search of a house shall take place except by virtue of law and in manner prescribed by law."

Constitution of Japan (Feb. 11, 1889):

"Art. 25. Except in the cases provided for in the law, the secrecy of the letters of every Japanese subject shall remain inviolable."

Constitution of Mexico (Feb. 15, 1857):

"Art. 16. No one shall be molested in his person, family, domicile, papers or possessions, except by virtue of a written order from a competent authority, which shall establish and set forth the legal grounds for the proceeding."

Constitution of Netherlands (1887):

"Art. 158. The entrance of a dwelling against the will of the occupant shall only be allowed in the cases determined by law and by virtue of a special or general warrant from an authority designated by law."

Constitution of Portugal (April 29, 1826):

"Art. 145 (6). The house of every citizen is an inviolable refuge. At night no one shall enter it except with his consent, or in case of request from within it, or to protect it from fire or flood; during the day no house shall be entered, except in the cases and in the manner provided by law."

Fundamental Laws of the Russian Empire (May 6, 1906):

"Chap. 1. 33. The domicile of everyone is inviolable. Searches or sequestrations in a domicile without the consent of the owner shall take place only in the cases and in the manner provided by law."

Political Constitution of the Spanish Monarchy (June 30, 1876):

"Art. 6. No one shall enter the house of a Spaniard or of a foreigner resident in Spain, without his consent, except in the cases and in the manner expressly provided by law."

[This provision is no longer in force. See Charter of Spain, 1945, *infra.*]

The following provisions are found in Peaslee, Constitutions of Nations (1950), *Vol. I (page references after the constitutional provisions are to Peaslee)*:

Fundamental Principles of the Government of Afghanistan (October 31, 1931):

"16. The residence of every Afghan subject is safe from every sort of interference. No official or other person may enter a private residence without an order under Shariat law or the law of the land." (p. 26)

Constitution of Albania (March 15, 1946):

"Art. 20. A home cannot be violated.

No person can enter a house and search it against the wishes of the owner, except when he holds a court order in his hands.

No search can be made except in the presence of two witnesses. The owner of the house also has a right to be present."

"Art. 21. The secrecy of mail and other correspondence cannot be violated except in cases of criminal investigations, military mobilization, or state of war." (p. 42)

Constitution of Argentina (March 16, 1949):

"Art. 29. . . . . The domicile is inviolable, as also the epistolary correspondence and private papers; and a law is to determine in what cases and with what reasons their search and seizure shall be allowed . . ." (p. 66)

Constitution of Belgium (February 7, 1831):

"Art. 10. The private domicile is inviolable; no search of premises shall take place except in the cases provided for by law and according to the form therein prescribed." (p. 128)

Constitution of Bolivia (November 23, 1945):

"Art. 15. . . .

Private papers and correspondence are inviolable and shall not be seized except in cases determined by law and by written order of competent authority setting forth the reasons therefor. Intercepted letters and private papers seized in violation of this provision shall have no legal effect.

Art. 16. Every house is an inviolable asylum; at night it shall not be entered without the consent of the person who inhabits it, and in the daytime, entrance thereto is only allowed on written order of a lawful authority setting forth the reasons therefor, except *in flagrante delicto*." (pp. 154-155)

Constitution of Brazil (September 24, 1946):

"§ 15. The home is the inviolable refuge of the individual. No one may enter therein at night, without the consent of the dweller, except to go to the assistance of the victims of a crime or a disaster, or during the day, except in the cases and in the manner established by law." (p. 207)

Constitution of Bulgaria (December 4, 1947):

"Art. 85. Homes are inviolable. Without the consent of the householder, no one may enter his home or premises and conduct a search there unless conditions required by law are observed." (p. 243)

Constitution of Burma (September 24, 1947):

"16. No citizen shall be deprived of his personal liberty, nor his dwelling entered, nor his property confiscated, save in accordance with law." (p. 251)

Constitution of Byelorussian, S.S.R. (February 19, 1937):

"Art. 102. Citizens of the B.S.S.R. are guaranteed inviolability of personal freedom. No one can be arrested without a court decree or a sanction of a public prosecutor.

Art. 103. The inviolability of citizens' homes and secrecy of correspondence are guaranteed by law." (p. 311)

Constitution of Canada (1867):

"There is no express declaration in the Constitution of Canada, as defined above, of rights of the people. As in other British Dominions, certain basic rights are recognized and enforced by the courts, which are deemed to flow from the British Bill of Rights of 1689, plus other legislative enactments, and decisions of British courts." (p. 318)

Constitution of Ceylon (May 15, 1946):

"The Constitution provides that no law enacted by Parliament shall prohibit or restrict the exercise of any religion; make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or alter the constitution of any religious body except with the consent of the governing authority of that body; and that any such laws shall be 'void.'

Apart from these provisions, other safeguards of the rights of the people are to be found in British constitutional documents, precedents and traditions." (p. 368)

Constitution of Chile (September 18, 1925):

"12. Inviolability of the home.

The house of any person living in Chilean territory can be forcibly entered only for a special purpose, determined by law, and by virtue of an order from the competent authority;

13. Inviolability of epistolary and telegraphic correspondence. Documents or public securities shall not be opened, intercepted, or examined except in the cases expressly designated by the law;" (pp. 414-415)

Constitution of Colombia (February 16, 1945):

"Art. 23. No one may be molested in his person or family, or imprisoned or arrested, or have his domicile searched, except upon a warrant issued by competent authority, with all legal formalities and for cause previously defined by law.

In no case shall there be detention, imprisonment, or arrest for debts or purely civil obligations, unless it is to secure the results of a suit.

Art. 24. He who is caught *in flagrante delicto* may be arrested and taken before the judge by any person. If the agents of the authority pursue him and he takes refuge in his own dwelling, they may enter it for the purpose of arresting him; and if he seeks asylum in the dwelling of another person, the consent of the owner or tenant thereof shall be previously obtained." (pp. 471-472)

Constitution of Costa Rica (December 7, 1871):

"Art. 30. The domiciles of the inhabitants of the Republic are inviolable, and may not be entered except in the cases and with the formalities prescribed by the law.

Art. 31. In no case can the private papers of inhabitants of the Republic be either seized or examined.

Art. 32. The secrecy of written or telegraphic correspondence is inviolable, and such as may have been seized shall not have legal weight." (p. 506)

Constitution of Cuba (July 5, 1940):

"Art. 32. Secrecy of mail and other private documents is inviolable, and neither the former nor the latter can be seized or examined except by official agents or officers, by virtue of a decree, stating its reasons, issued by a competent judge. In every case secrecy shall be maintained with respect to details alien to the matter that led to the seizure or examination. Secrecy of telegraphic, telephonic, and cablegraphic communication is declared inviolable on the same terms."

"Art. 34. Domiciles are inviolable, and consequently no one can enter at night the domicile of another without the consent of its occupant, unless it be to rescue the victims of a crime or disaster; nor by day, except in the cases and in the manner determined by law.

In case of the suspension of this guarantee, it shall be an indispensable requisite, for entering a person's domicile, that it be done by the proper competent authority, under a written order or resolution, an authentic copy of which shall be left with the occupant, his relatives, or the nearest neighbor, according to circumstances. When the authorities delegate any of their agents for the purpose, the same procedure shall be followed." (p. 532)

Constitution of Czechoslovakia (June 9, 1948):

"Section 4

The inviolability of the domicile is guaranteed. It may be restricted only on the basis of the law.

Section 5

1. The premises of no one may be searched, except in cases permitted under the law, and then only by a court or public functionary competent by law, and in the manner prescribed by law.

2. A search may be carried out, unless the law directs otherwise, only on the strength of a written circumstantiated warrant granted by a judge or competent authority. This warrant shall be served at the time of the search, or, if this is not possible, within 48 hours thereafter.

3. The functionary carrying out the search shall produce his authority, and furnish the person whose premises he has searched, at the request of that person, at the time of the search, or, if this is not possible, within 48 hours thereafter, with a written statement giving the reasons for the search, and the result thereof, and a list of all articles seized." (pp. 605-606)

Constitution of Denmark (June 15, 1915):

"79. The dwelling is inviolable. House searching, seizure and examination of letters and other documents if a special exception is not prescribed by any law, may take place only after a judicial decision has been pronounced." (p. 652)

Constitution of the Dominican Republic (January 10, 1949):

"Art. 6. There are consecrated as inherent in the human personality: . . .

8. Inviolability of correspondence and other private documents, which cannot be seized or inspected except as the result of legal proceedings in connection with matters which are then before the courts. Also inviolable is the secrecy of telegraphic, telephonic, and cablegraphic communication." (pp. 658, 659)

Constitution of Ecuador (December 31, 1946):

"Art. 187. The State guarantees the following to the inhabitants of Ecuador: . . .

(6) The inviolability of the home. No one may enter a home against the will of its proprietor unless an order signed by competent authority be presented: and without such an order, only in the cases expressly provided by the law;

(7) The inviolability of correspondence by mail or otherwise. Consequently the interception, opening, or inspection of another's correspondence is prohibited, except in the cases provided by the law;" (711, 712)

Constitution of Egypt (April 30, 1923):

"Art. 8. The home is inviolable. No search of a private house may take place except in cases stipulated for by law and carried out in conformity with its regulations."

"Art. 11. The secrecy of letters, telegrams, and telephone communications is inviolable, except in cases provided for by law." (p. 722)

Constitution of El Salvador (August 13, 1886):

"Art. 21. The searching of the person shall only be made to prevent an offense from being committed, or to investigate crimes or offenses." (p. 742)

Constitution of Ethiopia (July 16, 1931):

"Art. 25. Except in cases provided for by law, no domiciliary searches may be made."

"Art. 26. Except in cases provided by the law, no one shall have the right to violate the secrecy of the correspondence of Ethiopian subjects." (p. 769)

Form of Government of Finland (July 17, 1919):

"Art. 11. The domicile of Finnish citizens shall be inviolable.

The conditions under which domiciliary searches may be ordered and carried out shall be determined by law."

"Art. 12. The secrecy of postal, telegraphic, and telephonic communication shall be inviolable, except when otherwise provided by law." (p. 778)

The following constitutional provisions are found in Peaslee, op. cit. *Vol. II:*

Constitution of Greece (June 1 (14), 1911):

"Art. 12. The dwelling is inviolable. Domiciliary searches can only be made when and as the law directs.

Offenders against these provisions are punished for abuse of authority, and are bound fully to indemnify the injured party, and further to compensate him in a sum of money fixed at the discretion of the law court, but never less than one hundred drachmas."

"Art. 20. The secrecy of letters is absolutely inviolable." (pp. 52, 53)

Constitution of Guatemala (March 11, 1945):

"Art. 35. The correspondence of all persons and their private books and papers are inviolable. Those that are taken possession of will not have validity in litigation. They may be taken possession of or inspected only by virtue of the act of a competent judge and with the legal formalities.

Competent functionaries of the treasury may also, by written order, provide for the inspection of private papers and books that relate to the payment of the fiscal taxes. In all cases the seizure or inspection must be effected in the presence of the interested person, his representative or one of his relatives, and in their absence, before two witnesses, neighbors and of recognized integrity."

"Art. 37. The domicile is inviolable. No one may enter it without the permission of the owner, except by written order of a competent judge, and never after 6 P.M. or before 6 A.M. The law determines the formalities and the exceptions where breaking into a house may be proceeded with. The examination of documents and effects must always take place in the presence of the interested person, of his representative or of a member of his family, and for lack of them, before two witnesses, neighbors and of recognized integrity." (pp. 76-77)

Constitution of Haiti (November 22, 1946):

"Art. 14. No domiciliary visit or seizure of papers may take place except by virtue of law and in the legally prescribed forms."

"Art. 28. The secrecy of letters is inviolable. The law determines what agents are responsible for the violation of letters entrusted to the mail." (pp. 114, 115)

Constitution of Honduras (March 28, 1936):

"Art. 48. The habitation of every individual is a sacred asylum which may not be entered except by the authorities in the following cases:

(1) In order to take an offender discovered *in flagrante;*

(2) On account of the commission of an offense inside the habitation, on account of scandalous disorder requiring prompt remedy, or because of outcries from within;

(3) In cases of fire, earthquake, flood, epidemic, or other like cause; and to make any visit or inspection of a purely sanitary character;

(4) In order to set free a person unlawfully detained;

(5) To recover property in pursuance of a writ, acting on probable proof, at the least, of the presence of this property; and to execute a judicial sentence legally decreed;

(6) To apprehend a criminal against whom has been entered a sentence of imprisonment or of detention, acting, at the least, upon probable proof that he is hidden in the house to be entered.

In the last two cases entry shall not be made except under written order of competent authority.

Art. 49. Whenever the domicile to be entered is not that of the criminal sought, the authority, or its agents, shall first solicit permission of the tenant.

Art. 50. Entry of the domicile shall not be made from seven at night until six in the morning without permission of the head of the house.

Art. 51. Correspondence by letter and telegraph and private papers are inviolable without prejudice to that provided in the law of the state of siege.

Neither the executive power nor its agents may withdraw, open, or detain the said correspondence. Correspondence taken from the post office or any other place shall not be competent evidence in court.

Art. 52. Individual correspondence, private papers, and books shall not be seized except by virtue of a writ from a competent judge in criminal and civil cases as determined by law, and must be examined in the presence of the owner or, in his absence, of two witnesses, and that must be returned which has no relation to the matter under investigation." (pp. 139-140)

Constitution of Iceland (June 17, 1944):

"Art. 66. The home shall be inviolate. Houses may not be searched, nor any letters or other documents be detained and examined, except by judicial warrant or a special provision of law." (p. 177)

Constitution of Iran (December 30, 1906):

"Art. 9. The life, property, domicile, and honor of every individual is secured and guaranteed from every kind of injury. No one can be disturbed except by order of and in the manner defined by, the laws of the land."

"Art. 13. The dwelling-place and house of every individual is inviolable. In no dwelling-place can forcible entry be made, except by order of, and in the manner defined by, law."

"Art. 22. Postal communications are inviolable, and secured against seizure or opening, except in cases in which the law makes exception.

"Art. 23. The publication or seizure of telegraphic communications without the permission of the author of the telegram is forbidden except in cases in which the law makes exception." (p. 207)

Constitution of Iraq (March 21, 1925):

"Art. 8. The inviolability of all places of residence is guaranteed. They may not be entered or searched except in such circumstances and in such manner as may be prescribed by law."

"Art. 15. All postal and telegraphic correspondence and all telephonic communications shall be secret and free from censorship or detention, except in such circumstances and in such manner as may be prescribed by law." (p. 219)

Constitution of Ireland (December 29, 1937):

"Art. 40, 5. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law." (p. 259)

Constitution of Italy (January 1, 1948):

"Art. 13. Personal liberty is inviolable.

No form of detention, inspection, or personal search or any other restriction of personal liberty is permitted except by a duly authorized act of the judicial authorities and then only in cases and under the procedure prescribed by law.

In exceptional cases of necessity and urgency, explicitly provided by law, the public security authorities may take provisional measures which shall be communicated within forty-eight hours to the judicial authorities; and, should the latter not confirm their validity within the next forty-eight hours, such measures are considered revoked and lose all effect.

Physical and psychological violence against persons placed under some form of restriction of personal freedom is punished.

The maximum duration of preventive detention is specified by law.

Art. 14. Personal domicile is inviolable.

No inspection, search, or sequestration may be carried out, except in cases and under procedures prescribed by law and in accordance with the guarantees prescribed for the protection of personal liberty.

Investigations and inspections for reasons of public health or safety or for fiscal or economic reasons are regulated by special legislation.

Art. 15. Freedom and secrecy of correspondence and of every other form of communication are inviolable.

Limitations thereon may be effected only by a duly authorized act of the judicial authorities in accordance with the guarantees prescribed by law." (pp. 280-281)

Constitution of Japan (November 3, 1946):

"Art. 17. Every person may sue for redress, as provided by law, from the State or a public entity, in case he has suffered damage through illegal act of any public official."

Art. 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended while committing the offense."

"Art. 35. The right of all persons to be secure in their homes, papers, and effects against entries, searches, and seizures shall not be impaired except upon warrant issued for adequate cause, and particu-

larly describing the place to be searched and things to be seized, or except as provided by Article 33." (pp. 309, 310)

Constitution of Jordan (December 7, 1946):

"Art. 10. All dwelling houses shall be immune and no entry therein shall be permitted except in the circumstances and in the manner prescribed by the law."

"Art. 20. All postal, telegraphic and telephonic communications shall be treated as secret, and shall not be subject to censorship or to detention except in the circumstances prescribed by the law." (p. 323)

Constitution of Lebanon (May 23, 1926):

"Art. 14. The domicile is inviolable. No one may enter it except in the cases and in the manner prescribed by the law." (p. 353)

Constitution of Liberia (July 26, 1847):

"Sec. 9. No place shall be searched, nor person seized on a criminal charge, or suspicion, unless upon warrant lawfully issued, upon probable cause supported by oath, or solemn affirmation, specially designating the place or person, and the object of the search." (p. 365)

Constitution of Liechtenstein (October 5, 1921):

"Art. 32. The liberty of the person, the immunity of the home and the inviolability of letters and writings are guaranteed.

Except in the cases and in the manner determined by law, nobody may be arrested or kept in custody, nor may any search of homes or persons, letters or writings, or a seizure of letters or writings, be made.

There shall be a claim for full compensation, to be paid by the State and to be determined by the courts, on behalf of anybody who has been arrested illegally, or innocently, as proved by evidence, and on behalf of anybody who is convicted when innocent. The laws shall determine whether, and to what extent, the State shall have a claim for reimbursement against third parties." (pp. 379-380)

Constitution of Luxembourg (October 17, 1868):

"Art. 15. The domicile is inviolable. No domiciliary visit may take place except in the cases provided for by law and in the form which it prescribes." (p. 399)

Constitution of Mexico (January 31, 1917):

"Art. 16. No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention shall be issued against any person other than by the competent judicial authority, and unless same is preceded by a charge, accusation, or complaint for a specific offense punishable by imprisonment, supported by an affidavit of a credible party or by such other evidence as would point to the probable guilt of the accused; in cases of *in flagrante delicto*, any person may arrest the offender and his accomplices, turning them over without delay to the nearest authorities. Only in urgent cases instituted by the public attorney without previous complaint or indictment and when there is no judicial authority available may the administrative authorities, on their strictest accountability, order the detention of the accused, turning him over immediately to the judicial authorities. Every search warrant, which can only be issued by the judicial authority and which must be in writing, shall specify the place to be searched, the person or persons to be arrested, and the objects sought, the proceedings to be limited thereto; at the conclusion of which a detailed statement shall be drawn up in the presence of two witnesses proposed by the occupant of the place searched, or by the official making the search in his absence or should he refuse to do so.

Administrative officials may enter private houses for the sole purpose of determining if the sanitary and police regulations have been complied with; and demand to be shown the books and documents required

to prove compliance with fiscal rulings, in which latter cases they must abide by the provisions of the respective laws and be subject to the formalities prescribed for cases of search." (pp. 418-419)

Constitution of Monaco (January 5, 1911):

"Art. 8. The domicile is inviolable; no domiciliary visit may take place except in cases provided by law and in the manner which it prescribes." (p. 465)

Constitution of Mongol People's Republic (June 30, 1940):

"Art. 86. Citizens of the Mongol People's Republic are guaranteed inviolability of the person. No person may be placed under arrest, except by decision of a court or with the sanction of a procurator.

Art. 87. The inviolability of the homes of citizens and privacy of correspondence are protected by law." (p. 485)

New Zealand:

"There is no statement of rights of the people, but British laws and customs prevail." (p. 546)

Constitution of Netherlands (August 24, 1915):

"165. To enter a dwelling against the occupant's will shall only be permitted in the cases determined by law, by virtue of a special or general order given by an authority designated by law.

The forms to which the exercise of this power shall be bound shall be regulated by law.

166. The secrecy of letters entrusted to the postal service or to other public institutions of conveyance shall be inviolable, except by order of a judge in the cases described by law." (p. 533)

Constitution of Nicaragua (January 21, 1948):

"Art. 54. The State guarantees the inviolability of the home. The dwelling of any person in Nicaraguan territory may be forcibly entered only by the authorities in the following cases:

(1) In the actual pursuit of a delinquent;

(2) To remove a criminal surprised *in flagrante;*

(3) For complaints from the interior of the habitation; for the commission in it of a crime or for scandalous disorder that requires prompt remedy;

(4) In the case of fire, earthquake, flood, epidemic, or anything similar;

(5) For any visit or inspection for statistical, sanitary, or hygienic reasons;

(6) To liberate a person illegally held;

(7) To remove objects required by virtue of a trial, when there is at least some proof of the presence of the said objects;

(8) To execute a resolution, mandate, or judicial order legally decreed;

(9) To apprehend a culprit against whom has been issued an act of detention or imprisonment, when there is at least some proof that he is hiding in the house to be entered.

In the last four cases the house may not be broken into except by virtue of a written order and under direction of a competent authority.

When the domicile to be entered is not that of the prisoner who is being pursued, the authority or its agents shall first solicit the permission of the occupant.

Breaking into houses in the cases requiring written permission of a competent authority may not occur from seven at night until six in the morning without the consent of the head of the house." (pp. 640-641)

Constitution of Norway (May 17, 1814):

"99. No one may be arrested and committed to prison except in the cases determined by law and in the manner prescribed by the laws. For unjustifiable arrest and illegal detention the officer concerned shall be responsible to the person imprisoned."

"102. Domiciliary visits shall not be made except in criminal cases." (pp. 686, 687)

Constitution of Panama (March 1, 1946):

"Art. 26. The home is inviolable. No one may enter another's home without the consent of its owner, except by written order of competent authority or to help victims of crimes or disasters." (p. 705)

Constitution of Paraguay (July 10, 1940):

"Art. 27. Defense in the judgment of a person or rights is inviolable. Also inviolable are the domicile, epistolary correspondence, and private papers. The law will determine in what cases the inviolability of the domicile and correspondence may be suspended." (p. 747)

Constitution of Peru (April 9, 1933):

"Art. 61. The abode is inviolable. It may not be entered without the prior production of a written warrant, with a reason assigned, from the judge or the competent authorities." (p. 769)

Constitution of the Philippines (February 8, 1935):

"Sec. 1. (1) No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

"(3) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

"(5) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise." (p. 794)

The following constitutional provisions are found in Peaslee, op. cit. *Vol. III*:

Political Constitution of the Portuguese Republic (August 1, 1935):

"8. The following constitute the rights and individual guarantees of Portuguese citizens: . . .

(6) Inviolability of domicile and secrecy of correspondence on conditions determined by law." (pp. 5, 6).

Constitution of Rumania (April 13, 1948):

"Art. 29. The domicile is inviolable. No person may enter the home or residence of a citizen without his consent, except in his presence and on the basis of a written warrant from the appropriate authority, or in case of *flagrante delicto*." (p. 40)

Saudi Arabia:

"The constitutional documents contain no specific guarantees of individual rights." (p. 60)

Charter of Spain (July 16, 1945):

"Art. 13. Inside national territory, the State guarantees the liberty and inviolability of correspondence." (p. 78)

Constitution of Sweden (June 6, 1809):

"Art. 16. The King shall maintain and further justice and truth, prevent and forbid iniquity and injustice; he shall not deprive anyone or allow anyone to be deprived of life, honor, personal liberty or well-being, without legal trial and sentence; he shall not deprive anyone or permit anyone to be deprived of any real or personal property without due trial and judgment in accordance with the provisions of the Swedish law and statutes; he shall not disturb or allow to be disturbed the peace of any person in his home; . . ." (p. 99)

Constitution of Thailand (March 23, 1949):

"Sec. 33. The dwelling of a person in inviolable. The right belonging to a person to enjoy peaceful habitation in and peaceful possession of his dwelling is guaranteed. An entry into such a dwelling without his permission or a search thereof may be made only by virtue of the power determined by law." (p. 168)

Constitution of Turkey (January 10, 1945):

"Art. 70. Personal immunity, freedom of conscience, of thought, of speech and press, the right to travel, to make contracts, to work, to own and dispose of property, to meet and associate, and to incorporate form part of the rights and liberties of Turkish citizens.

Art. 71. The life, property, honor, and residence of each individual are inviolable." (p. 197)

Constitution of Ukrainian SSR (January 30, 1937):

"Art. 107. Citizens of the USSR are guaranteed the inviolability of the person. No one may be arrested without a court decree or a sanction of a public prosecutor.

Art. 108. The inviolability of citizens' homes and secrecy of correspondence are protected by law." (p. 218)

Union of South Africa:

"No rights of the people are expressly stated but many practices of British Courts are observed." (p. 223)

Constitution of the Union of Soviet Socialistic Republics (December 5, 1936):

"Art. 127. Citizens of the USSR are guaranteed inviolability of the person. No person may be placed under arrest except by decision of a court or with the sanction of a procurator.

Art. 128. The inviolability of the homes of citizens and privacy of correspondence are protected by law." (p. 281)

Constitution of Uruguay (March 24, 1934):

"Art. 11. The sanctity of the home is inviolable. No one may enter it by night without the consent of its master and by day only at the express order of the competent judge in writing and in cases determined by law." (p. 392)

Constitution of Venezuela (July 5, 1947):

"Art. 35. The Nation guarantees the inviolability of the home, which cannot be entered by force except in order to prevent the commission of a crime or in order to execute the decisions which the tribunals of justice may dictate pursuant to law. The home shall be subject, in accordance with the law, to the visits of health and fiscal authorities, due notice having first been given by the authorities or functionaries which order or make the inspection.

Art. 36. Oral, written, or any other form of correspondence shall be inviolable. No letters, telegrams, private papers, or any other means of correspondence shall be seized except upon fulfillment of the legal formalities by the judicial authority and preserving always all secrets relative to domestic and private life which have no bearing on the proceedings at issue. All books, vouchers, and accounting documents shall be subject to inspection or check by the competent authorities, in conformity with the laws." (pp. 474-475)

Constitution of Yugoslavia (January 30, 1946):

"Art. 29. The dwelling is inviolable.

Nobody may enter another person's dwelling or premises, or search them against the occupant's will, without a legal search-warrant.

A search may only be made in the presence of two witnesses. The occupant of the premises has the right to be present during the search of his dwelling or premises.

Art. 30. The privacy of letters and other means of communication is inviolable except in cases of criminal enquiry, mobilization, or war." (p. 526)

Draft National Constitutions Not Completely in Force in 1950:

Basic Law for the Federal Republic of Germany:

"Art. 13. (1) The dwelling shall be inviolable.

(2) Searches may be ordered only by a judge or in the event of imminent danger by other authorities provided by law and may be carried out only in the form prescribed therein.

(3) Interventions and restrictions may otherwise be undertaken only to avert a common danger or mortal danger to individuals and, on the basis of a law, also to prevent imminent danger to public safety and order, especially for the relief of the housing shortage, combatting the danger of epidemics or protecting juveniles exposed to dangers." (p. 602)

Draft Constitution of India (February 21, 1948):

"15. No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India." (p. 653)

Draft Constitution of Israel (December 10, 1948):

"Art. 13. (f) The liberty of the person is inviolable. No one shall be detained except pursuant to an order or judgment of a Court of Law, or when apprehended in flagrante delicto, or for the purpose of bringing him before a court on a charge of having committed a crime."

"Art. 14. The dwelling of every person is inviolable and shall not be entered or searched except in accordance with the law and in the manner therein prescribed. Private correspondence as well as telegraphic and telephonic communications shall not be intercepted. Any temporary suspension of these guarantees in time of war or national emergency shall require specific legislative authorization and shall be subject to parliamentary control." (p. 745)

The Universal Declaration of Human Rights, as approved on December 10, 1948 by the General Assembly of the United Nations, contains the following provisions:

"Art. 3. Everyone has the right to life, liberty, and security of the person."

"Art. 12. No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Yearbook of Human Rights for 1948 (United Nations), at pp. 466-467.

Additional constitutional provisions since 1950, statutes, and cases from various nations of the world, all pertaining to search, seizure, and the inviolability of the home, are collected in the annual Yearbooks of Human Rights, published by the United Nations. See Index therein, under *Home, inviolability of the.*

For a comprehensive collection of constitutional provisions, statutes, cases, and comments from the nations of the world on arbitrary arrest, detention, and exile, see *Freedom from Arbitrary Arrest, Detention and Exile—Yearbook on Human Rights, First Supplementary Volume,* (United Nations, New York, 1959).

APPENDIX D

58 PRE-1871 STATUTES IN 25 STATES INCORPORATING CITIES AND TOWNS AS "BODIES POLITIC AND CORPORATE."

Prior to 1871, at least 24 states had statutes incorporating towns and cities as "bodies politic and corporate" with capacity to sue and be sued. We quote a typical statute, and cite others. This list is illustrative only. A detailed search was made of the Alabama statutes. But in each of the other states only a few statutes were selected to serve as examples. Actually, many hundreds of such statutes had been enacted all over the nation prior to 1871.

ALABAMA

Acts of Ala., 1868, No. 132, pp. 474-76:

"An Act to incorporate the town of Scottsboro, county of Jackson.

"• • •

"Section 3. . . . [a]nd the said mayor and councilmen are hereby declared and constituted a body politic and corporate by the name and style of the 'mayor and councilmen of the town of Scottsboro,' by which name they . . . shall be capable of suing and being sued . . ."

Acts of Ala., 1857-58, No. 171, § 1, p. 194
No. 172, § 3, p. 204
No. 173, p. 206-07
Acts of Ala., 1859-60, No. 267, pp. 378-79
No. 268, pp. 381-82
No. 269, pp. 383-84
No. 270, p. 385
No. 273, p. 394
No. 278, p. 403-04
No. 280, p. 407

Acts of Ala., 1868, No. 22, § 1, p. 227
No. 40, § 2, pp. 257-258
No. 60, § 4, p. 55
No. 85, § 2, p. 73
No. 195, § 2, p. 212

CONNECTICUT

Conn. Private Laws, Vols. I & II (1789-1836), Title XI; pp. 368, 394, 406, 426, 441.

GEORGIA

Acts of Ga. (1861), No. 91, § 39.1, p. 95
Ga. Laws (1866), No. 251, §§ 1, 3, pp. 180-81
No. 268, §§ 1, 2, p. 196
Ga. Laws (1870), No. 113, § 1, p. 169
No. 121, § 1, p. 121

ILLINOIS

Ill. Laws (1835), p. 204: (Chicago)
Ill. Rev. Stat. (1845), Chap. XXV, Div. 1, § 4: (Chicago)

INDIANA

Rev. Stat. (1843) Chap. 25, § 8, p. 387: (general incorporation statute for towns)

IOWA

Iowa Rev. Laws (1860), Chap. 51, Art. 1, Sec. 1047 (18): (general incorporation law of Villages and Towns).

KANSAS

Kan. Laws (1862), Chap. XLVII, p. 398: (general incorporation law of villages and towns).

KENTUCKY

Ky. Acts (1839-40), Chap. 60, § 1, p. 36.
Ky. Acts (1853-54), Vol. 1, Chap. 202, § 1, p. 372

LOUISIANA

La. Acts (1855), No. 179, § 1, p. 232
La. Acts (1867), No. 41, § 1, p. 71

MICHIGAN

Mich. Laws (1857), No. 168, Sec. 22, p. 420-24: (general statute for incorporating villages)

MINNESOTA

Minn. Laws (1856), Chap. CXXVI, § 5, p. 134

MISSISSIPPI

Miss. Laws (1870), Chap. CXVI, § 1, p. 332
Chap. CLXXIII, § 2, p. 482

MISSOURI

Mo. Rev. Stat. (1845), Chap. 175, § 1, p. 1048: (general incorporation act for towns)

NEBRASKA

Neb. Rev. Stat. (1866), Chap. LIII, § 1, p. 379: (general incorporation act for towns); see also, p. 696

NEVADA

Nev. Laws (1869), Chap. XXXVIII, § 1, p. 78
Chap. XCIX, p. 162
Chap. CII, p. 175

NEW HAMPSHIRE

N. H. Rev. Stat. (1842), Chap. 31, § 1, p. 93

NEW YORK

N. Y. Colonial Laws 1664-1719 (Lyon 1894), p. 224
N. Y. Stat. (Blatchford, 1852), § 17, pp. 1043, 1046

NORTH CAROLINA

N. C. Private Laws (1866), Chap. 1, p. 2

OHIO

Ohio Rev. Stat. (Swan 1860), Vol. 2, Chap. 117, Sec. XVIII, p. 1498

PENNSYLVANIA

Pa. Laws (1954), No. 715, p. 790
Pa. Laws (1867), No. 668, p. 696

SOUTH CAROLINA

S. C. Stat. (Johnston 1840) Vol. 8, No. 2155, p. 290

VERMONT

Vt. Gen. Stat. (1863), Chap. 16, §§ 1, 4, p. 118: (general incorporation statute)

VIRGINIA
Va. Acts (1848-1849), Chap. 285, § 1, p. 209

WEST VIRGINIA
W. Va. Laws (1866), Chap. 59, § 3, p. 40

WISCONSIN
Wis. Rev. Stat. (1858), Title IV, Chap. XV, § 1, p. 175

The phrase "bodies politic and corporate" with power to "sue and be sued" was used as well in statutes chartering corporations other than cities and towns prior to 1871. See, for example:

Acts of Ala., 1855, No. 265, Sec. 1, p. 207: Florence Wesleyan University
Acts of Ala., 1855, No. 274, p. 219: Southern University
Acts of Ala., 1855, No. 278, Sec. 7, pp. 227-228: Commercial Bank
Acts of Ala., 1855, No. 333, Sec. 1, p. 347: Jackson Guards
Acts of Ala., 1855, No. 319, Sec. 3, pp. 325-26: Commerce Street Hotel
Acts of Ala., 1855, No. 288, Sec. 1, p. 257: Tuskegee Insurance Company.
Acts of Ala., 1855, No. 289, p. 261: Insurance Company
Acts of Ala., 1855, No. 290, p. 261: Insurance Company
Acts of Ala., 1855, No. 323, p. 333: mining and manufacturing company
Acts of Ala., 1859, No. 223, Sec. 1, p. 315
Conn. Private Laws, Vols. I & II (1789-1836), p. 475: Yale College (1745)
Ky. Acts (1839-40), Chap. 28, § 2, p. 19: literary institution
Ky. Acts (1830-40), Chap. 84, § 1, p. 45: church
Md. Laws (1860), Chap. 31, § 3: board of commissioners of public schools

APPENDIX E

SEVEN PRE-1871 STATE STATUTES DEFINING "PERSONS" AS BODIES POLITIC AND CORPORATE.

Prior to 1871 at least seven states had codified the common law construction of the word "person" in their statutes. The Illinois statute quoted below is typical.

Ill. Rev. Stat. (1845) p. 472, §29:

> "The word 'person' . . . shall be deemed to extend to and include bodies politic and corporate, as well as individuals."

The following statutes are similar:

Iowa Rev. Stat., (1860) Ch. 3, §29 (26), No. 13, p. 6.

Miss. Rev. Stat. (Hutchinson's Miss. Code, 1848) Ch. 64, Art. 12, Tit. 8 (29).

N.H. Rev. Stat. (1842) Ch. 1, §8.

Code of Va. (1849) Tit. 9, §17.

Vt. Rev. Stat. (1839) Ch. 4, §11.

Wis. Rev. Stat. (1858) Ch. 5, §1, p. 82.